IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mantei v. Afzali,*
2023 BCSC 759

Date: 20230505
Docket: M172551
Registry: Vancouver

Between:

John Mantei

Plaintiff

And

Rafatullah Afzali

Defendant

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

Counsel for the Plaintiff:	C.R. Bacon J.D. Maledy J. Kennedy, Articled Student
Counsel for the Defendant:	M. von Antal
Place and Dates of Trial:	Vancouver, B.C. October 12-14, 17-21 and 24-28, 2022
Place and Date of Judgment:	Vancouver, B.C. May 5, 2023

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Introduction

[1] Mr. John Mantei was a 50-year-old fire captain with Vancouver Fire and Rescue Services ("VFRS") when, on his way home from a night shift in late July 2015, he came upon a vehicle accident blocking his way south on the Alex Fraser Bridge. He came to a full stop. After a couple of seconds, his vehicle was rear-ended by a vehicle that had not seen the road blockage ahead and was travelling at full highway speed. I will refer to this incident as the MVA.

[2] The defendant has admitted liability for the MVA.

[3] The issues before the court are to determine the nature and extent of Mr. Mantei's injuries arising from the MVA and to assess damages.

Facts

The Plaintiff's Background

[4] Mr. Mantei was born in 1965. He was very involved in athletic activities, with soccer being his primary focus. He met and eventually married Deborah, who was the daughter of his high school soccer coach. He began coaching soccer while still in high school, developing a passion for coaching which continued throughout his working life.

[5] After high school, Mr. Mantei completed both a cement masonry trade program and fire protection courses offered at BCIT. He initially worked as a cement mason, but applied in 1985 for employment with VFRS. He was hired as a firefighter in May 1986, just before his 21st birthday. He successfully completed his six-month probation, and became a regular employee and member of the firefighters union, Local 18 (the "Union"), in November 1986.

[6] Mr. Mantei injured his right knee in 1988 when he slipped on the running board coming off a fire truck. He was 23 years old at the time. He had arthroscopic surgery in 1989. He was back playing soccer, including high level tournaments, later that year.

[7] In July 1989, the Manteis purchased their first house. It required substantial renovations before they were ready to move in. They stayed in a basement suite elsewhere until October 1989, when they moved in to the renovated upper floor, then worked on renovating the basement. Mr. Mantei did significant amounts of the renovation work himself.

[8] In February 1991, Mr. Mantei (then aged 26) reinjured his right knee. This led to further surgery (ACL reconstruction). He was back walking by the summer of 1991, off work for approximately a year, and wore a Generation II knee brace for two years after surgery. After that, he returned to playing soccer – often wearing a neoprene sleeve on his right knee. His evidence was that, after that surgery, his knee would swell up from time to time – particularly if he was playing sports like soccer. There were also occasional issues with the knee locking up.

[9] In November 1992, Mr. Mantei received a lump-sum payment from WorkSafeBC ("WSBC") based on its conclusion that his residual impairment in his right knee reflected a 5% permanent partial disability.

[10] The Manteis had daughters Kylie in 1991 and Lauren in 1994.

[11] Mr. Mantei's WSBC file indicated that he reported further work incidents involving his right knee in 1996, 1997, 1998, 1999 and 2003.

[12] In 2000, the Manteis sold their starter home and purchased a new home in North Delta. It was on a large lot with substantial hedges, lawns, and a swimming pool and a firepit in the back yard. Mr. Mantei primarily cared for the yard, other than the flower gardens.

[13] Mr. Mantei was involved in a motor vehicle accident in September 2000. He sustained a concussion, headaches, vision problems and some balance issues. He took time off work over the next several months. His evidence was that the issues from that accident had almost entirely resolved by 2003-2004, and that he was back playing competitive soccer in 2004-2005.

[14] In 2003, Mr. Mantei began taking company officer training to put himself in a position to seek promotion within VFRS. In May 2004, he was promoted to Lieutenant. This began a steady climb through the ranks.

[15] Also in 2004, Mr. Mantei obtained his B national coaching certification from the Canadian Soccer Association, which allowed him to coach national and high level teams. He had continued to coach soccer, including for his daughters, and in a number of years coached more than one team at the same time. In 2010, Mr. Mantei was inducted into the Delta Sports Hall of Fame in recognition of his long-time contributions as a soccer coach in the community.

[16] As a coach, Mr. Mantei was known for his supportive and encouraging way with players, helping them to be the best they could be. He was also known for his creativity in developing drills that would increase in complexity. His consistent message to his players was that if you play your game and have fun, you will do well. His players were engaged and enthusiastic about being part of his teams, and his teams were very successful.

[17] Mr. Mantei also began to play recreational hockey in 2004. In 2006, a firefighters team in the over-35 division, which Mr. Mantei played on, was a provincial cup finalist.

[18] In about 2011, Mr. Mantei took further courses aimed at qualifying for further promotion within VFRS. In April 2012, he was promoted to Fire Captain. As a fire captain, he earned 122% of what a first-class firefighter would earn.

[19] Shortly thereafter, Mr. Mantei became an Acting Battalion Chief. That qualified him to cover shifts when a regular Battalion Chief was unavailable. When working as an Acting Battalion Chief, he was paid at the applicable rate which was 140.2% of that of a first-class firefighter. In order to qualify to apply to become a regular Battalion Chief, Mr. Mantei was required to work 96 shifts in an acting capacity. He took on such shifts whenever he could. He also began, in the fall of

2014, to take a senior fire management program offered at BCIT on a part-time basis.

[20] Mr. Mantei gave extensive evidence as to his work as a firefighter. In addition, a number of Mr. Mantei's former colleagues with VFRS gave evidence. All of the evidence painted a consistent picture of Mr. Mantei as a model firefighter who loved his work. He maintained a high level of fitness. He was an excellent communicator and leader. As an officer, he was known for his "radio work" to coordinate the crews under his command. His operational skills were very strong, as he was able to coordinate even larger crews at larger fires. He balanced being an aggressive firefighter with a high commitment to safety. At the fire hall, he was known as a jokester with a good sense of humour. He was also committed throughout his time as an officer to mentoring other firefighters, and particularly those who aspired to the officer ranks themselves.

[21] In 2013, Mr. Mantei became a Vice President of the Union. The Union had several vice presidents, each with specific areas of responsibility. Mr. Mantei's areas of responsibility were officer development, career path development and specialty teams. Among his duties were to work with members preparing for officer exams, and he would spend many hours on the phone outside of his regular shifts performing that duty. In addition to these specific duties, members of the Union executive would attend grievance hearings and multiple meetings each month, with increased time commitments when bargaining was under way. Mr. Mantei was paid for his work on the Union executive at a first-class firefighter's rate.

[22] Also in 2013, Mr. Mantei became a training officer with VFRS. Initially, that work focused on training new recruits, but in 2014 he also began teaching some of the officer training courses. He was paid for his work as a training officer at 128.11% of a first-class firefighter's rate.

[23] In addition to his work as a training officer, Mr. Mantei became a member and later a co-chair of the joint labour/management safety committee. The committee had one co-chair from senior management and one co-chair from the Union

executive. Mr. Mantei had a longstanding passion for safety in firefighting and this gave him an opportunity to influence the direction of the VFRS on safety matters. As well, he was paid for his work at time-and-a-half based on the pay rate applicable to his current rank.

[24] Mr. Mantei also became part of what was known as the Critical Incident Stress Management ("CISM") team. This team would proactively work to deal with the stress and trauma inherent in work as a first responder. It would go out to talk to staff at fire halls, and was also available to do "defusings". Defusings would take place when a crew had been involved in a particularly difficult call – including a call involving fatalities – and would provide a structured means for those involved to debrief the incident and hopefully assist in processing what they had experienced.

[25] Mr. Mantei gave evidence as to his career plan in the years leading up to the MVA. His goal was to complete the required shifts as an Acting Battalion Chief and apply to become a confirmed Battalion Chief as quickly as possible – he hoped to accomplish this by 2016. His expectation was that he would work for a year or two as a Battalion Chief, then apply for an Assistant Chief position. His goal was to work to age 59 (2024). That would permit him to have five years at the higher management salary level, which was important given that his pension benefit level would be based on the five best earning years. The mandatory retirement age for a firefighter of any rank is 60 years old.

[26] Mr. Mantei's involvement in the soccer world also continued to progress. In 2013, he began to be paid for coaching high level soccer teams. He coached a team of 2001-born girls with the Fusion FC program, and in 2015 he began coaching a team of 2003-born boys with the Fraser Valley FC program. His daughter, Lauren, was a goalkeeping coach with the Fusion team. He also obtained certification in 2013 as a soccer referee.

[27] The documents before the court did not indicate any issues with Mr. Mantei's knee from early 2003 until the MVA. The only work-related injury reflected in those records was in April 2014, when Mr. Mantei felt a pull in his stomach after assisting

an ambulance crew transport a stretcher with a very heavy patient. He took six days through WSBC to rest and recover. His doctor's clinical note stated "question of bilateral sports hernia" but it is not clear that a hernia was actually diagnosed.

[28] As of early 2015, Mr. Mantei was playing soccer regularly, coaching two high level soccer teams, doing some refereeing, playing on a recreational hockey team during the winter season, working out regularly in his home gym, and hiking the Grouse Grind on a regular basis (sometimes more than once in a day). He would golf or go roller-blading on occasion as well. His evidence was that he had no significant ongoing problems with his right knee, but would occasionally wear a neoprene brace when playing soccer.

[29] Mr. Mantei had his annual physical examination with his family doctor, Dr. Rauh, on June 7, 2015. The exam was normal, with Dr. Rauh noting that Mr. Mantei continued to be very fit (although slightly overweight).

The MVA

[30] At about 8:00 in the morning of July 26, 2015, Mr. Mantei was driving home after having worked a night shift. He was headed south on the Alex Fraser Bridge in a 2003 Pontiac Vibe. He noticed someone standing by the road side waving a warning, slowed down, and was able to stop when he came upon an existing accident on the bridge with a vehicle blocking a couple of lanes of traffic. The defendant was driving a vehicle behind him, did not notice the accident or that Mr. Mantei had slowed down, and rear-ended Mr. Mantei's vehicle.

[31] Mr. Mantei's evidence at trial was that the next thing he remembers is being on the other side of the accident scene, parked on the side of the road, and wondering what had happened. While there is a gap in his memory, he does not specifically remember losing consciousness. He got out of the vehicle on his own. He spoke with the defendant, who asked if he was okay and commented that he was going 100 km/hr at the time of the collision.

[32] Mr. Mantei's recollection was that in the immediate aftermath of the MVA, he had a headache, felt off balance, dizzy and woozy, and was sore on the side of his head, in his shoulders and his lower back. His evidence was that in the collision the left side of his head hit the windshield and that his knees hit the bottom of the dashboard. [At an examination for discovery in 2018, Mr. Mantei had said that he did not recall striking his knee, but that he began to experience pain in his right knee within a few days of the MVA.]

[33] An ambulance arrived and a paramedic assessed Mr. Mantei and recommended he go to hospital. By this time, he was feeling nauseous and cold. He was strapped to a spinal board and taken to Royal Columbian Hospital. He does not really remember the ambulance ride.

[34] He arrived at the hospital at 9:21 am. Emergency room staff performed a CT scan of his neck and a chest x-ray and provided him with painkillers. He was discharged from hospital just over three hours later and his wife drove him home. She described him as a bit confused and disoriented.

Events After the MVA

[35] Mr. Mantei saw his family doctor, Dr. Rauh, the next day. Dr. Rauh assessed what he described as significant soft tissue injuries, and prescribed anti-inflammatory and muscle relaxant medications. Dr. Rauh's notes of that visit do not record a diagnosis of a concussion, nor do they make reference to any loss of consciousness in the MVA. In cross-examination, Dr. Rauh noted that this was a lengthy appointment with multiple symptoms, that his practice is to record his notes after the appointment is completed, and that there were likely things he was told that did not make it into the notes. He recalled that Mr. Mantei was obviously very shocked, and relayed that he may have lost consciousness, but that it was not very clear. Dr. Rauh also did not record any knee problems that day – although Ms. Mantei (who drove to the doctor's office) recalled that Mr. Mantei's knee had swollen up by then and he was moving gingerly. When asked about this, Dr. Rauh

commented in his testimony that “I think the least of his problems that day was his knee”.

[36] At all material times, Mr. Mantei’s work schedule was based on an eight-day rotation in which he would work two day shifts, followed by two night shifts, followed by four days off work. At the time of the MVA, Mr. Mantei had accumulated 291 sick days – which was the maximum an employee was entitled to carry under the collective agreement. Following the MVA, Mr. Mantei booked off his next two four days work cycles as sick days. Those two cycles were followed by previously scheduled vacation time which went from August 10 to October 24, 2015.

[37] Mr. Mantei spent these sick and vacation days primarily resting at home. He would take pain medications as necessary – generally starting with extra-strength Tylenol and moving to T3s if necessary. He began massage therapy with registered massage therapists at Ladner Massage, and also began physiotherapy in the fall. He found that both helped with the pain, and noted in particular that the home exercises he was provided by the physiotherapist were helpful.

[38] Mr. Mantei and his extended family had a longstanding tradition of getting together to camp at Hicks Lake, near Chilliwack, each August. In previous years, Mr. Mantei had taken the lead in setting up a “tent city”, and engaged in various water sports. While Mr. Mantei still went to Hicks Lake in August 2015, his daughter Lauren did the set-up and Mr. Mantei borrowed a trailer from a friend that he could sleep in. He did not engage in water sports and was described as stiff, sore, withdrawn, and not himself. While he would normally have stayed for two weeks, he had a meeting with ICBC a few days in and chose to return home after that meeting.

[39] Mr. Mantei had a further appointment with Dr. Rauh on September 14, 2015. Dr. Rauh noted that Mr. Mantei reported multiple ongoing symptoms including poor sleep, headaches, difficulty with problem-solving and moments of anxiety. He reported that his balance was improving. There was also a note that: “Right knee previous contact with motor vehicle also improving but slightly numb”. Dr. Rauh noted “no focal neurological abnormalities”. Under the heading “Assessment”, he

recorded “postconcussion”. He also recorded ongoing neck and shoulder pain, and as a result requested an ultrasound of Mr. Mantei’s neck.

[40] The soccer teams Mr. Mantei had been coaching resumed in August, and he resumed attending practices and games. Mr. Mantei’s evidence was that he was not the same coach after the MVA. He believes that doing demonstrations is an important part of coaching. After the MVA, he was limited to doing the simplest demonstrations of things like foot placement. He could not demonstrate complex drills or be involved in scrimmages. He also found himself impatient with his assistant coaches, his players, and others such as referees. He found it difficult to resist micro-managing the assistant coaches, to the point that he would undermine them. He was easily frustrated, and was not setting an example.

[41] One of his assistant coaches, Mr. Kerr, commented that Mr. Mantei would be sitting or supporting himself against a fence, and regularly moving around to try to get into a comfortable position. Lauren Mantei, who had been primarily a goalie coach before the MVA, became an assistant coach. She commented that her father had very little patience, was sometimes short with the players, that his drills were very repetitive, and that at times he seemed to be just going through the motions. At times, she felt undermined as a coach, and these issues began to impact their father-daughter relationship.

[42] Mr. Mantei described attending a tournament in Seattle in the fall of 2015. Deborah Mantei drove Mr. Mantei to the tournament – he was unable to travel on the team bus, because of the noise from a bus full of players, so the assistant coaches travelled on the bus. He also found the night games difficult with the field lighting.

[43] Beginning on September 29, 2015, Mr. Mantei was treated by a chiropractor who focused on concussion-related issues. This involved a series of 15 treatments concluding in March 2016.

[44] Mr. Mantei saw Dr. Rauh again on October 26, 2015. Dr. Rauh noted that at the time, the most significant issue was post-concussion syndrome, with symptoms

including difficulty with concentration, a short fuse, forgetfulness and very poor sleep. He recommended that Mr. Mantei continue working with the chiropractor, continue with manual therapy for his soft tissue injuries, try melatonin for his sleep issues, and to remain off work.

[45] Mr. Mantei did not work again in 2015, taking sick days from the end of his pre-scheduled vacation in October to the end of December 2015. He did do some work with the Union – primarily comprised of telephone interviews to prepare candidates for promotion, and continued his coaching.

[46] Mr. Mantei saw Dr. Rauh again on December 2, 2015. He reported at the time that he felt his concentration was slightly better, but that he still felt his head was shaking, was still having bad dreams, and was still having difficulty sleeping. Dr. Rauh concluded that Mr. Mantei was not yet a candidate to return to work, and that he would follow up in several weeks.

[47] At a further appointment on December 22, 2015, Dr. Rauh noted that Mr. Mantei was feeling a “sharper ability to concentrate” and was keen to get back to work. They discussed a return to work in early January 2016.

[48] Mr. Mantei’s first days back at work were on January 7-8, 2016. He was apprehensive going back to work. He found it good to be back with his crews, but was concerned about his balance and other injuries, and worried that he felt forgetful and disorganized. He was not as confident in himself, and less outgoing than usual, but worked through those concerns.

[49] Mr. Mantei ended up working 14 shifts in January 2016. His evidence was that he was very focused on getting in the shifts he needed to be promoted to Battalion Chief, and that he was not eligible to work as an Acting Battalion Chief unless he was taking his regular shifts as a Captain. He took as many Acting Battalion Chief shifts as he was able. He described those shifts as slightly less physical than shifts as a captain. However, he found it more challenging to track all of the different teams at a complex fire scene. This was something that he had

previously found very easy to do, keeping it all in his head, but he was now having to write things down.

[50] In February 2016, Mr. Mantei worked only six shifts (February 2, 3, 10, 11, 18 and 19). He took sick days on February 4-5, and was off on personal leave on February 12, 2016. He took a series of sick days beginning on February 20, 2016.

[51] On March 8, 2016, Mr. Mantei saw Dr. Rauh again. Dr. Rauh's notes indicate that Mr. Mantei's concerns at the time included difficulty with concentration, movements and balance, pain in the right knee especially with loading, and neck pain with decreased range of motion. Dr. Rauh requested imaging of Mr. Mantei's right knee, and encouraged him to continue with physiotherapy.

[52] Mr. Mantei returned to work for a few more shifts, then took his annual vacation from March 17 to May 23, 2016.

[53] Mr. Mantei saw Dr. Rauh on April 11, 2016. Mr. Mantei reported significant ongoing pain, especially in his neck, and significant sleep disturbance. Dr. Rauh noted ongoing concerns with concentration and balance. He requested further imaging of the right knee as well as an MRI of the cervical spine.

[54] Mr. Mantei saw Dr. Rauh again on May 9, 2016. In addition to ongoing neck and back pain, Mr. Mantei complained of what he called "brain fog" which made him more hesitant, and of ongoing poor sleep. Dr. Rauh noted that the knee imaging showed some "loose bodies" in the knee, and commented in his notes that with the dashboard injury Mr. Mantei may have knocked off a pre-existing osteophyte. They discussed the possibility of further post-concussion treatment.

[55] Mr. Mantei attended testing with Dr. Wilkinson, a neuropsychologist, on May 25 and 31, 2016, for purposes of an independent medical examination. Dr. Wilkinson's report of June 15, 2016, which recommended counselling for anxiety and PTSD, will be discussed in more detail below.

[56] Mr. Mantei took further sick days on May 24-27, 2016, then returned to work on June 1, 2016, working a regular series of shifts on June 1-4, 9-12 and 17-20.

[57] Mr. Mantei saw Dr. Rauh again on June 21, 2016. It appears from Dr. Rauh's notes that he was told about some of Dr. Wilkinson's recommendations but might not have been provided with the report at the time. The symptoms recorded by Dr. Rauh are similar to those from previous visits. He noted that although Mr. Mantei was presently back at work, he had to concentrate very hard doing the tasks that came very easily in the past.

[58] Mr. Mantei took sick days again from June 25-28, 2016. In July 2016, he worked regular shifts on July 3-6 and 11-14, then was off on a combination of sick days and vacation days for the balance of the month.

[59] At some point in July 2016, Mr. Mantei reached out to a fellow VFRS officer, Mr. Hartner. Mr. Hartner and Mr. Mantei had worked together as firefighters over the years, had both been training officers at the same time, had played together on the VFRS hockey team, and had hiked the Grouse Grind together prior to the MVA. Mr. Hartner was also heavily involved in the VFRS employee assistance program ("EAP"), and was a lead peer counsellor with the EAP in 2016. It was in that capacity that they met approximately 10 times to discuss the issues Mr. Mantei was dealing with. Mr. Hartner provided recommendations to Mr. Mantei with respect to obtaining psychological counselling.

[60] Mr. Hartner gave evidence with respect to his observations of Mr. Mantei. He had worked with Mr. Mantei both before and after the MVA. His comment was that Mr. Mantei after the MVA was a different man – he had lost confidence, and was "the jokester who couldn't tell jokes any more".

[61] Mr. Mantei saw Dr. Rauh on August 8, 2016. At that time, he was experiencing particular issues with his lower back, and Dr. Rauh requested an MRI of his lumbar spine. He also noted that Mr. Mantei was going to see a psychologist.

[62] Beginning on August 22, 2016, Mr. Mantei began a program of active rehabilitation with KARP Rehabilitation.

[63] On August 28, 2016, Mr. Mantei was assessed by Dr. Waseem, a physiatrist, for purposes of an independent medical evaluation. Dr. Waseem's report will be discussed below.

[64] In September 2016, Mr. Mantei worked two four-day cycles early in the month, then was off work on sick days for the balance of the month. He also worked two four-day cycles in October 2016, then was off on bereavement leave (after his father passed away) and sick days. He worked his regular shifts for much of November and December 2016. Mr. Mantei's evidence was that he was determined to complete the necessary shifts to qualify to become a Battalion Chief, and worked through pain in order to do so. He also continued with course work at BCIT.

[65] Mr. Mantei saw Dr. Rauh again on November 7, 2016. Mr. Mantei reported ongoing concerns about neck, back and shoulder pain, right knee pain, and ongoing post-concussion symptoms such as memory loss and moodiness. Dr. Rauh recommended psychological counselling as well as ongoing exercises and massage therapy.

[66] At some time in late 2015 or early 2016, Mr. Mantei began to experience nightmares and flashbacks. Some of them related to the MVA. Others related to things he had experienced as a firefighter. Others related to things he had seen on television or read about, or that he had heard about through his work on the CISM team. By the end of 2016, the nightmares became more intense and more frequent, and sleep became more of a problem. This impacted on his irritability as well.

[67] In late 2016 or early 2017, Mr. Mantei stepped away from the CISM team. His decision to do so was primarily a result of the nightmares he had been experiencing.

[68] At the end of January 2017, Mr. Mantei was diagnosed with Type 2 diabetes.

[69] Mr. Mantei continued to work the majority of his scheduled shifts in early 2017, taking a few sick days each month. In April 2017, he completed the required 96 days of work as an Acting Battalion Chief and scheduled an officer promotion interview. On May 12, 2017, he was confirmed as Battalion Chief and posted to Fire Hall No. 1. He describes this as a huge relief.

[70] At the end of the second day shift after he was confirmed, the night shift Battalion Chief pointed out some things that Mr. Mantei had failed to mark on a magnetic board on which shift information was kept. This was a big concern for Mr. Mantei, as he did not understand how he had missed a simple but important task. He took a series of sick days, not returning until June 20, 2017.

[71] At the end of May 2017, the VFRS posted a position for an Acting Assistant Chief, Operations position. Mr. Mantei applied for it. He said that part of him still felt like he would be getting better, and that he still wanted to move forward in management. He passed the applicable exam for the position, and was invited to an interview, but before the interview happened the position was rescinded.

[72] At some point in 2017, Mr. Mantei was approached by senior management with respect to his attendance. There was a suggestion that he should be on an attendance management program. This was very embarrassing for Mr. Mantei, who said that prior the MVA he had taken only a few sick days in his career. Mr. Mantei spoke with the Union president, Rob Weeks, who told him he would deal with management.

[73] From June 20 to September 26, 2017, Mr. Mantei worked the bulk of his scheduled days, with only a few scheduled sick days. He continued with his various therapies, and with occasional visits to Dr. Rauh.

[74] In late September 2017, Mr. Mantei's knee problems became more acute. He had an appointment with Dr. Rauh on October 3, 2017. At that point, Dr. Rauh reviewed an x-ray of Mr. Mantei's right knee, which showed significant osteoarthritic changes. He requested an MRI of the knee. There was also discussion of ongoing

issues with balance, anxiety and low energy. Dr. Rauh completed a medical certificate for Mr. Mantei's work, indicating that he should be off work for 15-28 days.

[75] Mr. Mantei saw a locum doctor at Dr. Rauh's office on October 31, 2017, who reviewed the knee MRI and referred Mr. Mantei to an orthopaedic surgeon.

[76] Mr. Mantei had booked vacation time for late 2017. He and Ms. Mantei traveled to Florida to spend time at Disney World, followed by a cruise. Mr. Mantei's evidence was that, while at Disney World, he spent a lot of time in the hotel room resting, and that when he did walk around the parks he had headaches and back pain.

[77] On the cruise, Mr. and Ms. Mantei spent time talking about their life plans. They discussed the need to simplify their lives, including selling their home and moving into a place requiring less work, and the need for counselling. They also discussed the possibility that Mr. Mantei may need to focus on simply getting through to November 2021 (when he would have worked the 35 years needed to qualify for a full pension, albeit based on a lower than anticipated best five-year salary).

[78] In January 2018, both daughters moved out of the family home. Both now live in Langley.

[79] By February 2018, Mr. Mantei was seeing two different counsellors: a Mr. Ram for eye movement desensitization and reprocessing ("EMDR") therapy, and a Ms. Nemetz, who provided more general counselling. Among the issues he was working through with both counsellors, but particularly with Ms. Nemetz, was coming to grips with the reality that he was not going to achieve what he thought he would in his career, and his desire to continue working in order to maximize his pension while facing challenges with performing at the level he wanted to perform at.

[80] In the spring of 2018, Mr. Mantei began working shifts on modified duties. Unfortunately, the modified duties he was given involved a lot of computer work which he found challenging given his post-concussion symptoms.

[81] Mr. Mantei was off work from April 10, 2018, for the balance of the year. Mr. Mantei saw Dr. Rauh on May 2, 2018. They discussed issues of mood, right knee pain, right shoulder pain, poor sleep, and difficulty with concentration and memory. Dr. Rauh advised Mr. Mantei that he needed a total knee replacement and encouraged him to restart massage therapy. Dr. Rauh signed a form for the VFRS stating that Mr. Mantei would be ready to return to work in one-to-two months.

[82] On May 15, 2018, Mr. Mantei was assessed by Dr. Zarkadas, an orthopaedic surgeon, for purposes of an independent medical examination. Dr. Zarkadas' report will be discussed below.

[83] Mr. Mantei had continued as a Vice President of the Union after the MVA. However, he began to miss some meetings that he should have attended. The Secretary-Treasurer, Mr. Lanthier, testified that Mr. Mantei began to appear disorganized, was struggling to complete tasks that were assigned to him, and in some cases to remember what he had been assigned. When things were done, they appeared to be thrown together at the last minute. One of Mr. Mantei's functions was to review new VFRS career postings and ensure they were compliant with the collective agreement. At times, he was not completing his review until after the competition closing date. The President, Mr. Weeks, testified that at meetings Mr. Mantei would bring up matters that had been previously decided. On two occasions, he left behind binders containing the Union's confidential negotiating materials – once in a VFRS boardroom, and once in a restaurant.

[84] After a private conversation with Mr. Weeks and Mr. Lanthier, Mr. Mantei decided to resign as Vice President of the Union. His resignation was effective June 1, 2018.

[85] Later in June 2018, Mr. and Ms. Mantei sold their house in North Delta and moved to Chilliwack. They purchased a townhouse that was only four years old and in good condition. The strata corporation takes care of most of the outside maintenance, they have a cleaning service keep the interior in good shape, and they hire a company to do exterior cleaning like window washing from time to time.

[86] On July 17 and 28, 2018, Mr. Mantei saw a locum doctor at Dr. Rauh's office. This appointment focused on mood and depression, and the doctor screened for suicide risk (Mr. Mantei denied any active suicidal thoughts). The doctor prescribed anti-depressant medication, as well as an MRI of Mr. Mantei's shoulder.

[87] In September 2018, the VFRS posted another Assistant Chief position – this one with responsibility for recruitment, outreach, diversity and inclusion. Mr. Mantei did not apply – he explained that by this time he was focusing on his health, and was intending to simply continue as a Battalion Chief until he got to a retirement point.

[88] Mr. Mantei's medical appointments in the fall of 2018 focused on his right shoulder, his right knee, and issues with mood and sleep.

[89] Mr. and Ms. Mantei took another cruise at the end of 2018. This time, Ms. Mantei intentionally booked an outside cabin with a balcony. Her evidence was that Mr. Mantei spent a lot of time on the cabin balcony and engaged very little with other passengers.

[90] At the end of 2018, Mr. Mantei resigned as the Union's safety officer and his term on the safety committee expired.

[91] At the end of January 2019, the VFRS posted the position of Assistant Chief, Occupational Health, Safety and Wellness. These were areas that Mr. Mantei was passionate about, and colleagues encouraged him to apply. He declined to do so, given his health concerns.

[92] Mr. Mantei had several appointments with Dr. Rauh in January and February 2019, which focused on the extent to which he was ready to return to work given his ongoing symptoms. At a February 11, 2019, appointment, Dr. Rauh advised that he would support a gradual return to work.

[93] On February 12, 2019, Mr. Mantei met with an orthopaedic surgeon, Dr. Belle, who recommended that he proceed with total knee replacement ("TKR")

surgery on his right knee. He agreed to do so, and the surgery was scheduled for August 2019.

[94] On February 28, 2019, Mr. Mantei returned to work with modified duties. His assigned duties were primarily office work, and did not include attending fires. The VFRS accommodated him with a chair and a podium where he could stand up and sit down. He struggled with reaching and with leaning.

[95] Mr. Mantei met again with Dr. Rauh on March 25, 2019, who provided a certificate recommending that over the course of April, Mr. Mantei gradually increase the length of his work days to full days at the end of the month, after which his ability to work on that basis could be re-assessed.

[96] Mr. Mantei saw Dr. Rauh again on April 1, 2019, reporting heart palpitations, particularly in the early mornings. Dr. Rauh arranged for heart monitoring and provided revised recommendations for a gradual return to work.

[97] Mr. Mantei saw Dr. Rauh again on May 6, 2019, reporting headaches, dizziness and noise intolerance with his increased work days. Dr. Rauh noted his view that Mr. Mantei was too rapidly returning to a greater workload, and recommended that he go down to three days a week at six hours per day.

[98] On May 27, 2019, Mr. Mantei was assessed by Dr. McConkey, an orthopaedic surgeon, for an independent medical examination at the request of the defendant. Dr. McConkey's report will be discussed below.

[99] Mr. Mantei saw Dr. Rauh again on June 17, 2019. Dr. Rauh completed a certificate for VFRS noting that Mr. Mantei continued to be very motivated, but required further accommodation. He suggested that, starting July 1, his workload be increased to four days, with his computer work limited to two hours per shift.

[100] Mr. Mantei worked through to July 17, 2019, then was on sick leave until early August. He had previously scheduled vacation time for the last few months of the year which was to allow time for him to recover from the TKR surgery.

[101] On August 12, 2019, Mr. Mantei was assessed by Dr. Kiraly, a psychiatrist, for an independent medical examination. Dr. Kiraly's report will be discussed below.

[102] Mr. Mantei underwent TKR surgery on August 13, 2019. He saw Dr. Belle on August 28, 2019, who reported that Mr. Mantei was doing better than expected, was walking with crutches but was able to fully weight-bear, and that he had full extension and flexion just past 90 degrees.

[103] Mr. Mantei's evidence was that he worked really hard on rehabilitation from his knee replacement. He was very happy that finally one of his physical ailments was improving, and felt that this was the one time he felt he had control of his situation. Ms. Mantei commented that Mr. Mantei carefully followed the recovery recommendations. However, her observation was that once the recovery of the knee plateaued, Mr. Mantei's emotional tailspin began again.

[104] Mr. Mantei saw Dr. Rauh again on October 21, 2019. Dr. Rauh's notes reflect a 40-minute discussion focused on issues of anxiety and depression, in which Mr. Mantei expressed concern about his long-term prospects as a firefighter and acknowledged significant mental health issues. Dr. Rauh noted significant depression, made several suggestions including cognitive behavioural therapy, and commented that Mr. Mantei needs to regain some confidence in his abilities as a firefighter.

[105] Dr. Rauh prepared a medical-legal report dated November 14, 2019. As well, Mr. Mantei was assessed on December 27, 2019, by Bruce Hunt, an occupational therapist, for purposes of a functional capacity evaluation. Both of these reports will be discussed below.

[106] The clinical records indicate that Mr. Mantei obtained extensive counselling assistance over the next few months, including with Ms. Nemetz and Mr. Ram. He also sought out marriage and family counselling in recognition of the impact his issues had upon his family relationships. In February 2020, he also obtained assistance from a Ms. Isaac, a counsellor who works with the BC Firefighters mental

health task force. Ms. Nemetz testified at trial, and the clinical notes of both Ms. Nemetz and Ms. Isaac were in evidence. They reflect Mr. Mantei struggling with both physical and psychological issues, including nightmares and flashbacks, and that he worried about making a bad decision if he went back to work.

[107] Mr. Mantei returned to work for a partial day on December 30, 2019. This was his first day at work since mid-July. His sick time had run out, and he needed to work a certain number of shifts in order to access vacation and sick days for 2020. As he moved into January, he began working partial days, using his vacation time to make up for the balance of the hours. Initially, he was working limited hours for two days at a time. His evidence was that his knee was feeling better, but had not yet sufficiently recovered for him to return to full duties.

[108] Mr. Mantei's goal at the time was to build up to be able to work four days at a time. He still wanted to work to the end of 2021 (a further two years) in order to complete 35 years of pensionable time.

[109] In mid-January 2020, Mr. Mantei slipped in a parking lot at work and fell onto the side of his right leg and had a pull in his stomach. He filed a WSBC claim. The VFRS work records indicate that Mr. Mantei's days worked in January 2020 were January 6, 9, 14, 16, 17, 25 and 30.

[110] Mr. Mantei met with Dr. Rauh on January 27, 2020, who recommended that he performed modified duties for three days each rotation doing six-hour days. For the next month, he worked February 2, 8-10, 16-18 and 24-26.

[111] The clinical notes of Mr. Mantei's massage therapy appointment on February 21, 2020, note that Mr. Mantei was finding working consecutive days, and driving to and from work in rush hour very challenging, that his headaches, neck pain and lower back pain were the worst they had been in some time, and that he was having difficulty sleeping. He was also finding that being on his feet in work boots was uncomfortable and causing pain in his right knee. Mr. Mantei noted in his

evidence that by this time, he was working not just in the office but also in the training area, which required him to wear steel-toed work boots.

[112] Mr. Mantei met with Dr. Rauh on March 2, 2020, for what Dr. Rauh described as prolonged counselling regarding Mr. Mantei's mood. Mr. Mantei reported having difficulty with the increase to three full days per work cycle, and was wondering about his future. After discussion, Dr. Rauh recommended a continuation of the three-day work cycle, subject to a limit of three hours of computer work per shift.

[113] In March 2020, Mr. Mantei worked on March 3, 5, 6, 11-13, 19-21 and 29. As well, during that month Mr. Mantei had a number of sessions with his counsellors, Ms. Isaac and Ms. Nemetz. In her clinical notes of a March 5, 2020 counselling session, Ms. Isaac noted concerns about stress, anxiety, nightmares, as well as "grief and sense of loss of self and of the work invested over his career for job advancement/promotion".

[114] In a session with Ms. Nemetz on March 9, 2020, Mr. Mantei noted that his sick days were going to run out very soon and he would try to return to working four days. However, he found the tasks at work he was being assigned were not interesting and that he felt like a ride-along and no longer felt comfortable in uniform. He felt degraded and out of place, being unable to go out on calls. He reported increased suicidal thoughts. Dr. Nemetz posed the question – why not retire? With respect to this session, Mr. Mantei's evidence was that he felt he was no longer worthy of wearing the uniform, that he was struggling with work, and that Dr. Nemetz encouraged him to think of his own health and safety.

[115] At some point in mid-March 2020, Mr. Mantei was driving with the chief to fire halls for visits. While they were at a fire hall, the alarm tones activated and everyone there went to the fire. Mr. Mantei waved as the crew left, and as he was standing at the fire hall he was struck with feelings of embarrassment and worthlessness, leading to thoughts of suicide. His evidence was that it was this experience that led directly to his decision to retire.

[116] Ms. Isaac's notes of March 16, 2020, reflect Mr. Mantei reporting thoughts of self-harm, leading her to do a safety assessment – in which Mr. Mantei assured her he was safe and would not harm himself. They worked on a safety plan to follow should those thoughts arise again. Ms. Isaac's notes of March 23, 2020, note that Mr. Mantei was signing his retirement papers, and was struggling with the reality of his retirement.

[117] For Mr. Mantei, retirement was a struggle, as before the MVA he had plans to go further with the VFRS, to really make a difference at the management level, and to retire at age 59 with five years at a management salary determining his pension. However, his evidence was that he ultimately recognized that the limitations on his physical, mental and emotional health since the MVA made retirement his only realistic choice.

[118] Mr. Mantei's retirement was effective April 1, 2020. At the time, he was 54 years old and had accumulated 33 years and five months of pensionable service.

[119] After retirement, Mr. Mantei continued to experience issues with his mood, as well as headaches, nightmares, and ongoing physical symptoms.

[120] Mr. Mantei had continued coaching soccer. However, when the season ended in April 2020, he decided to stop coaching.

[121] Mr. Mantei continued to receive treatment for both physical and psychological symptoms. He continued with massage therapy as well as kinesiology. He also continued to experience nightmares, poor sleep, and an emotional rollercoaster. He continued with counselling and also with anti-depressant medications.

[122] In August 2020, Ms. Mantei retired from her work as manager of a bank branch. Although she had planned to work for a longer period, she struggled to deal with Mr. Mantei being at home by himself. She was distracted by her concerns and found she was not able to give her team at work what it needed.

[123] At the end of August 2020, Mr. Mantei was approached by the technical director of another high level soccer association, Coastal FC, to ask if he was interested in returning to coaching. Mr. Mantei spoke with and exchanged texts with the person, but ultimately decided not to return to coaching. His evidence was that he had not been happy with the way he was treating the players in recent years, and his ongoing inability to deal with the physical aspects of coaching was also a concern.

[124] At some point in 2021, Mr. Mantei was diagnosed with mild obstructive sleep apnea. The condition was sufficiently mild that he was not prescribed a CPAP machine.

[125] Throughout 2021, Mr. Mantei continued with various forms of therapy, without significant change to either his physical or psychological symptoms.

[126] In April 2022, Mr. Mantei began a course of treatment with a chiropractor, Dr. Kufske, with specific experience in concussion management. Dr. Kufske worked in the same clinic as the kinesiologist and physiotherapist Mr. Mantei was working with. With a coordinated approach, they worked to build up Mr. Mantei's ability to engage in exercise without triggering headaches.

[127] Mr. Mantei also continued to see both Mr. Ram and Ms. Isaac regularly for counselling. In March 2022, he attended a mental health retreat for firefighters, run by the BC Firefighters Association, which was staffed by two psychiatrists who worked with those attending on their mental health issues. Shortly before trial, Mr. Mantei was referred to a psychiatrist in the Chilliwack area, but his initial appointment was not scheduled to occur until several months after the trial.

Current Symptoms

[128] Other than the improvement to his right knee, arising from the TKR surgery, Mr. Mantei's evidence is that his physical symptoms have not improved and that his psychological issues have actually worsened since the MVA.

[129] His evidence is that his headaches and other post-concussion symptoms have been relatively consistent for the last few years. He still experiences dizziness, and continues with treatments for vertigo. He also gets a lightheaded feeling if he bends or stands quickly or raises the level of his exercise intensity. His balance is still off, and as a result he walks in a guarded manner. He still experiences memory issues, finds himself easily confused and feels disorganized.

[130] He still experiences light sensitivity every day. He wears a baseball cap most of the time and sunglasses when outdoors. He also experiences blurry vision or double vision from time to time – particularly when tired. If things are moving at different speeds around him, he feels disoriented. His memory is still not good, and he has problems with concentration. He is bothered by being in noisy or crowded places, and will try to sit in a corner with no one behind him. He still experiences ringing or buzzing in his ears. He continues to experience disturbed sleep, waking up regularly at 4 a.m.

[131] Mr. Mantei's evidence is that his neck and lower back pain continue, and have not improved. He experiences pain in his right shoulder, but that pain is dependent on what kind of activities he is undertaking.

[132] Mr. Mantei still finds himself being irritable, and he and Ms. Mantei do very little socializing. He continues to experience anxiety, depression and nightmares.

Medical Expert Evidence

Dr. Waseem – Physiatrist

[133] Dr. Waseem is a specialist in physical medicine and rehabilitation. He conducted an independent medical examination of Mr. Mantei on August 27, 2016, at the request of counsel for the plaintiff, and issued his report on September 13, 2016. He did a further assessment of Mr. Mantei on June 9, 2022, and issued an update report on June 17, 2022.

[134] In his 2016 report, Dr. Waseem concluded that Mr. Mantei suffered soft tissue injuries in the MVA. With respect to the cervical spine, he concluded that Mr. Mantei

had ongoing myofascial pain of the bilateral trapezius muscles and mechanical neck discomfort due to spondylosis. More than likely, he had pre-existing degenerative disc disease in the cervical spine, which had been made increasingly symptomatic by the MVA.

[135] With respect to the right shoulder, he concluded that the soft tissue injury had placed increased stress on the rotator cuffs and resulted in right shoulder impingement syndrome.

[136] With respect to the lower back, he concluded that the soft tissue trauma had resulted in dysfunction of the right sacroiliac joint and myofascial pain of the psoas muscle on the right side.

[137] With respect to the right knee, he noted the likely pre-existing pathology of the right knee, but concluded that due to a contusion injury from the MVA, this had been made increasingly symptomatic, and Mr. Mantei suffered from osteoarthritis of the knee.

[138] In 2016, Dr. Waseem described Mr. Mantei's prognosis as uncertain, given that he had yet to achieve maximum medical recovery and that there were other treatments available. He also recommended further investigation with respect to the shoulder.

[139] In his June 2022 report, Dr. Waseem noted that his physical examination was largely the same as in 2016, other than improvements to the knee and a reduced range of motion of the right shoulder. He noted the following specific findings on his examination:

a) Altered tone and texture of the support muscles of the cervical spine;

b) Reduced range of motion of the cervical spine with pain during range of motion testing;

c) Positive provocative testing for right shoulder impingement with pain during right shoulder range of motion testing;

d) Reduced range of motion of the lumbar spine with positive provocative testing for right sacroiliac joint dysfunction; and

e) Increased pain with palpation of the right psoas muscle.

[140] Dr. Waseem's diagnosis in June 2022 was mostly similar to that of September 2016; however, having reviewed the MRI of Mr. Mantei's shoulder in August 2018, he concluded that Mr. Mantei's right shoulder impingement syndrome was secondary to symptomatic supraspinatus partial thickness tear.

[141] He also noted that, subsequent to the TKR surgery, Mr. Mantei's right knee was much improved, however the knee continued to show residual medial laxity.

[142] With respect to prognosis, Dr. Waseem opined in 2022 that:

> The prognosis for a full symptomatic recovery is poor for the following reasons: the symptoms have been long-standing in nature persisting for over 6.5 years despite appropriate conservative measures and medical attention; although his right knee is much better his condition is otherwise worsen since the previous assessment leading to a further decline in function over time; he continues to have objective physical findings on examination suggesting his recovery will probably be refractory to medical management; reported psychological symptoms have led to emotional stress and hampered his physical recovery; disturbed sleep has complicated his recovery; and presumed pre-existing, yet asymptomatic degenerative changes of the right shoulder and knee have been rendered symptomatic thereby contributing to a protracted and less than complete recovery.
>
> While some further improvement with the outlined treatment recommendations is possible, he will continue to experience pain. His physical condition would be considered chronic and unremitting and, therefore, permanent.

[143] Dr. Waseem recommended ongoing active rehabilitation, intermittent massage therapy, and that consideration be given to cortisone injections to the shoulder and sacroiliac joint.

[144] Dr. Waseem's cross-examination focused mainly on his opinion with respect to Mr. Mantei's right knee issues. Dr. Waseem acknowledged that while he was aware of Mr. Mantei's prior knee surgery, he was not aware of Mr. Mantei's WSBC claims with respect to his knee in the later 1990s and in 2003. He agreed that the

imaging from 2019 showed that at that time Mr. Mantei had end-stage arthritis in the knee, and that end-stage arthritis in a knee will be functionally limiting regardless of the cause. He agreed that Dr. Belle's consultation report of February 2019 described Mr. Mantei's knee issues as "progressive". However, Dr. Waseem maintained his opinion that the MVA contributed to Mr. Mantei's right knee issues between the time of the MVA and the TKR surgery.

Dr. Wilkinson – Neuropsychologist

[145] Dr. Wilkinson is a registered psychologist and neuropsychologist. As noted above, she saw Mr. Mantei in late May 2016 – some 10 months after the MVA. Her report was formatted to provide a brief summary of her qualifications, followed by a two-page summary of her opinion. Attached to the report are appendices comprising some 21 pages in which the details of the information she reviewed and her analysis are set out.

[146] Dr. Wilkinson's summary diagnosis included generalized anxiety disorder, posttraumatic stress disorder, and adjustment disorder with depressed mood. She summarized her psychometric testing as showing "intact abilities, with occasional losses of performance". With respect to cognitive functioning, she commented that the neuropsychological assessment showed "good cognitive function, with no signs of cognitive impairment" which was "nevertheless marked by occasional lapses" which she attributed to his psychological conditions. She commented that at the time he was not ready to return to work.

[147] In Dr. Wilkinson's summary of the background facts, she stated that following the MVA, Mr. Mantei had "full recollection of events" and was alert and oriented. Her detailed summary of the patient history, however, included notes that immediately following the collision Mr. Mantei "did not recall how he got past the van and pulled off onto the shoulder", that he got out of his car and was initially in "fireman mode", that he then began to feel nauseated and dizzy, that he "does not remember much of the ambulance journey", that he "felt vague, and missed some of the journey", and

that he “does not really remember” either the CT scan of his head or going to the washroom at the hospital.

[148] On cross-examination, Dr. Wilkinson was asked about the nightmares reported by Mr. Mantei. She acknowledged that the nightmares included incidents at Mr. Mantei’s work. She acknowledged that firefighters are regularly faced with destruction and death, and that many will have underlying PTSD. She agreed with the suggestion that Mr. Mantei would likely eventually experience some nightmares even in the absence of the MVA. She suggested that typically, such nightmares would be triggered by an injury to the individual.

Dr. Kiraly – Psychiatrist

[149] Dr. Kiraly is a psychiatrist. He conducted an independent medical examination of Mr. Mantei on August 12, 2019, at the request of counsel for the plaintiff, and issued his report on October 10, 2019. He did a further assessment of Mr. Mantei on June 23, 2022, and issued an update report on July 12, 2022. His reports were three and six years after the report of Dr. Wilkinson.

[150] Dr. Kiraly’s first report indicates a detailed review of past medical records as well as a variety of testing at the time of his assessment. With respect to Mr. Mantei’s cognitive functioning, the first report notes that:

> The cognitive functions were examined in detail. He was oriented to time, place and person. He experienced good judgment. His visuospatial functions were within normal limits. He was able to copy a geometric figure and he was able to draw the face of a clock with numbers and the arms of the clock were positioned appropriately to show the time, 5 minutes after 4 o’clock.
>
> His language skills were okay and his abstract thinking was intact. He did not have expressive or comprehensive types of aphasia.
>
> His concentration was only fair. He had difficulties with the serial 7s as noted. He was able to do numbers forwards and backwards.
>
> His recent memory was also only fair. He was able to recall 3 out of 5 items after 2 minutes. He lamented that, “My memory used to be great”.
>
> The Mini Mental Status Examination score was estimated to be about 27/30, which is within normal limits. He lost some points because of concentration and recent memory difficulties.

[151] His diagnosis included the following:

a) Mild neurocognitive disorder due to a traumatic brain injury;

b) Major depression with anxiety features;

c) Posttraumatic stress disorder; and

d) Somatic symptom disorder, predominantly pain.

[152] With respect to the first of these diagnoses, Dr. Kiraly noted in his 2019 report the following diagnostic criteria:

> – Symptoms of either major or mild neurocognitive disorder are present.
>
> – There is evidence of a traumatic brain injury with one or more of the following – loss of consciousness – posttraumatic amnesia – being disoriented and confused – signs of neurological problems.
>
> – The disorder starts right after the brain injury or loss of consciousness and lasting past the acute post-injury period.

[153] With respect to the application of these criteria, he commented:

> Mr. Mantei had a brief period of loss of consciousness and amnesia. He did not remember moving his car off the road. He had neurocognitive symptoms of poor attention, concentration and memory and poor sleep, anxiety and depression. He had a change of personality. He continues to have most of these difficulties, He fulfills the criteria for the diagnosis of a mild neurocognitive disorder due to a traumatic brain injury.

[154] With respect to PTSD, Dr. Kiraly noted that Mr. Mantei may have had some PTSD symptoms prior to the MVA, but that the MVA in all likelihood exacerbated the trauma symptoms. He commented that the trauma resulting from the MVA is not just the collision itself, but also the aftermath, including Mr. Mantei's loss of his good health and role functions.

[155] With respect to prognosis, Dr. Kiraly concluded that Mr. Mantei's prognosis was poor. He recommended ongoing psychotherapy and counselling, as well as treatment by a psychiatrist and consideration to psychotropic medications.

[156] Dr. Kiraly commented in his 2019 report that, in all likelihood, Mr. Mantei's working days would be cut short due to the worsening of his overall condition.

[157] With respect to causation, Dr. Kiraly discussed at some length a variety of predisposing, precipitating and perpetuating factors, ultimately concluding that the most important precipitating factor for his current difficulties was the MVA in 2015.

[158] Dr. Kiraly saw Mr. Mantei virtually in June 2022 for purposes of an update report. He noted that Mr. Mantei had, since being seen in 2019, retired from work as a firefighter. Dr. Kiraly confirmed that, after his review in June 2022, his diagnosis and his views as to Mr. Mantei's prognosis remained the same.

[159] On cross-examination, Dr. Kiraly was asked about Dr. Wilkinson's comment that Mr. Mantei "had full recollection of events" at the time of the MVA. He noted that Mr. Mantei had said he did not recall various things that happened in the time following the MVA, which could reflect a loss of consciousness, but that in any event his diagnosis of mild neurocognitive disorder due to a traumatic brain injury could result from any one of loss of consciousness, post-accident confusion or post-accident amnesia, and that there was evidence in this case of all three.

[160] Dr. Kiraly also agreed that Dr. Wilkinson's report as written did not contain a diagnosis of a concussion. He was firm in his view that Mr. Mantei suffered a concussion in the 2015 MVA. Dr. Kiraly's evidence was that he viewed the concussion Mr. Mantei had suffered in 2000 as serious, but having largely resolved. However, he saw it as a serious pre-disposing factor for having a greater likelihood of complications from a future concussion.

[161] With respect to Mr. Mantei's nightmares, Dr. Kiraly's evidence on cross-examination was that he viewed the trauma from the 2015 MVA as having triggered a re-awaking of other gruesome things in Mr. Mantei's past. He commented that this is not uncommon, and that once a person is having nightmares, the content can be about different things from the person's past. With respect to the trauma from the 2015 MVA, he commented that the trauma arising from the 2015 MVA is not so

much the actual collision itself, but rather what has happened to his life since the MVA in terms of his loss of good health, role function and livelihood.

[162] Finally, Dr. Kiraly was cross-examined about his comments about Mr. Mantei's cognitive abilities, in light of what Dr. Wilkinson had concluded as a result of her 2016 neurocognitive testing. Dr. Kiraly agreed that Mr. Mantei had sufficient cognitive function to complete the Battalion Chief course. He agreed that there was not a substantial deterioration of Mr. Mantei's cognitive functioning between his first and second assessments of Mr. Mantei. He commented that there was evidence of difficulties with things such as concentration, and that in his view the results of Mr. Mantei's 2016 neuropsychological testing by Dr. Wilkinson were not inconsistent with his diagnosis of mild neurocognitive disorder due to a traumatic brain injury.

Dr. Rauh – Family Doctor

[163] Dr. Rauh is a medical doctor with a special interest in sports medicine. He was Mr. Mantei's family physician from approximately 1987 until his April 2022 retirement from his family practice. His treatment of Mr. Mantei is reflected above in the factual narrative.

[164] Dr. Rauh prepared a medical-legal report with respect to Mr. Mantei in November 2019. He described Mr. Mantei's "clinical course" in the months following the MVA as follows:

a) Neurological symptoms – continuous difficulty with balance, sensation of dizziness, very labile mood, poor sleep, and difficulty with memory and concentration;

b) Musculoskeletal symptoms – neck pain without neurological patterns, difficulty with range of motion, right knee pain slight swelling, right shoulder pain and feeling of instability, decreased range of motion.

[165] He also reported noticing significant depression in Mr. Mantei in late 2017.

[166] Dr. Rauh opined that Mr. Mantei suffers from a post-traumatic brain injury which, in his opinion, is significantly impacted by his previous traumatic brain injury in 2000. He opined that as a result Mr. Mantei continues to suffer from balance problems and difficulty with concentration. Dr. Rauh also opined that Mr. Mantei has become quite depressed, and that while Mr. Mantei was initially in denial and hesitant to reveal the extent of his mood given the culture of his workplace, he has more recently had extensive counselling and continues under care of psychology.

[167] In cross-examination, Dr. Rauh was asked about a comment in his report that Mr. Mantei, following the MVA, “may have lost consciousness very briefly”. He agreed that he did not have a specific note of that in his clinical notes from July 27, 2015. In fact, the only symptoms recorded in the “Subjective” notes of that meeting were that Mr. Mantei “feels as if he is a little drunk” and “is a little bit off balance”.

[168] Dr. Rauh recalled that Mr. Mantei had said at the time that he might have lost consciousness, but that it was not very clear, which is not unusual. His evidence was that his clinical notes are a brief summary prepared after an appointment that are not always a complete record of everything discussed. His recollection was that the June 27, 2015 appointment was a lengthy one and that he could have written a chapter.

[169] Dr. Rauh gave a similar answer when it was drawn to his attention that he referenced concussion and right knee issues in the September 14, 2015 clinical notes but not in the June 27, 2015 clinical notes.

[170] Dr. Rauh was also asked about comments in his various clinical notes that there were “no focal neurological abnormalities”. His evidence was that this did not mean the patient was not in a post-concussive state.

Dr. Zarkadas – Orthopaedic Surgeon

[171] Dr. Zarkadas is an orthopaedic surgeon. He conducted an independent medical examination of Mr. Mantei in May 2018 at the request of counsel for the plaintiff.

[172] Dr. Zarkadas noted in his report that Mr. Mantei recalled his right knee hitting the dashboard at the time of the 2015 MVA.

[173] Dr. Zarkadas commented that as a result of the 2015 MVA, Mr. Mantei continues to have right-sided neck pain, right shoulder pain, right-sided lower back pain and right knee pain.

[174] Dr. Zarkadas noted that an x-ray and an MRI of Mr. Mantei's cervical spine in 2016 each demonstrated some multi-level degenerative changes. He commented that Mr. Mantei's examination and history are consistent with a whiplash injury to his neck with associated myofascial discomfort of his right paracervical musculature and trapezius. He commented that his examination of Mr. Mantei was consistent with right shoulder impingement, and that his history and exam are consistent with right-sided mechanical lower back pain. He noted, however, the lack of imaging of the back and shoulder.

[175] With respect to causation, Dr. Zarkadas concluded that it is more likely than not that the 2015 MVA is directly responsible for his right-sided neck pain, right shoulder pain, right-sided lower back pain and a component of his right knee pain. He suggested that the 2015 MVA probably aggravated underlying cervical spine degenerative changes. With respect to the right knee, he said "I suspect the blunt injury to his right knee worsened his right knee patellofemoral symptoms".

[176] Dr. Zarkadas recommended further conservative treatment with active rehabilitation and massage, an MRI of the right shoulder, and consideration of a total knee replacement.

[177] Dr. Zarkadas described Mr. Mantei's prognosis as poor, given that he had very little recovery in pain or function with respect to his neck, right shoulder and lower back. As well, he commented that the MVA had aggravated the right knee sufficiently that it may warrant a total knee replacement at some point in the next five years (i.e. 2018-2023). He expressed concern about Mr. Mantei's ability to function

safely while fighting fires, and suggested that he should take on a more sedentary role.

[178] On cross-examination, Dr. Zarkadas stated that he was aware of Mr. Mantei's initial 1988 and 1991 knee injuries and the 1991 knee surgeries; however, he was not aware at the time of his assessment of Mr. Mantei of his various subsequent reports to WSBC of knee problems.

Dr. McConkey – Orthopaedic Surgeon

[179] Dr. McConkey is an orthopaedic surgeon. He conducted an independent medical examination of Mr. Mantei in May 2019 at the request of counsel for the defendant. He also provided update letters on May 4 and August 26, 2022, based on a review of additional documents (in May 2022) and the update reports of Drs. Waseem and Kiraly.

[180] With respect to Mr. Mantei's neck, Dr. McConkey commented that the plaintiff had significant osteoarthritis of his cervical spine prior to the 2015 MVA, which was visible on the CT scan taken on the day of the MVA. He opined that Mr. Mantei experienced a whiplash injury in the MVA, but that the whiplash and myofascial type injuries had since resolved and any ongoing issues were attributable to the pre-existing osteoarthritis.

[181] With respect to Mr. Mantei's lower back pain, Dr. McConkey commented in his report that:

> It appears he has some lower back pain. In the absence of pre-existing lower back pain prior to the motor vehicle accident, I will relate his lower back pain to the motor vehicle accident. It is likely he had some degenerative change on imaging predating the motor vehicle accident, as it is very common in the symptomatic and asymptomatic population.

[182] With respect to Mr. Mantei's right shoulder, Dr. McConkey concluded that Mr. Mantei has a subacromial bursitis. He commented that it is "plausible that his shoulder complaints are related to" the MVA, either on the basis that his arm was on

the steering wheel and sustained an acute force, or in association with the myofascial disorders of the neck and upper back.

[183] With respect to Mr. Mantei's knee, Dr. McConkey concluded that his symptoms are related to the 1991 ACL reconstruction, and have nothing to do with the 2015 MVA. He noted in particular the lack of documented complaints recorded by a medical practitioner prior to September 2015 – which was two months after the MVA. He concluded:

> Without the motor vehicle accident, even if he did strike his knee in the car, which was not documented by anybody, I believe his knee would be in the exact same space and same state, namely that he would be waiting for a total knee replacement due to his injury in 1991. I do find it hard to believe that he struck his right knee in the accident given the lack of documentation by anybody in the acute phase after the accident.

[184] With respect to prognosis, he concluded that with proper treatment the prognosis for the right shoulder is very good, given that subacromial bursitis is treatable. With respect to the knee, he commented that a total knee arthroplasty would successfully treat the symptoms, although it would not permit a return to soccer. With respect to the mechanical neck and back pain, Dr. McConkey concluded that there would be some degree of neck pain, although he reiterated his view that the neck pain was significantly related to pre-existing osteoarthritis.

[185] In his update report in May 2022, Dr. McConkey concluded that after reviewing additional documents provided to him, his opinion remained the same. In his August 2022 update report, Dr. McConkey disagreed with Dr. Waseem's conclusions with respect to the right shoulder and right knee, and confirmed that his opinion remained the same.

[186] Dr. McConkey's cross-examination focused primarily on two areas in which he differed from the other experts: with respect to Mr .Mantei's neck and shoulder issues, and with respect to his knee issues.

[187] With respect to the neck, Dr. McConkey agreed that there had been no reference to neck pain in any medical records in the years leading up to the MVA,

but relied on the scan done the day of the accident as showing degenerative change in the cervical spine. He also relied on the lack of what he considered to be "objective" findings on his examination of Mr. Mantei. Although he acknowledged there was pain on palpation at the time of that examination, Dr. McConkey explained that he did not consider that to be an objective finding:

> And this is one of the challenges that – that exist in this adversarial personal injury system is that, you know, the ones that end up at trial are the – are not the ones where the guy gets run over by the car and breaks his tibia. It's where the person – you --- you push on their hand and says – and they say "ouch". There's no way to prove or disprove injury, physical injury.
> And so, you know, I mean, the guy's got a large personal injury lawsuit going on. Clearly it is to his benefit to say "ouch, it hurts when you push there". I'm not saying that's why he did it. What I am saying is that there was no objective finding of – of disability in the muscles around his neck when I examined him. There was no myofascial injury. There was no taut bands. There was no stiffness in the – or spasm in the muscles.
> So I related his lack of range of motion to the arthritis in his neck, which was – which was evident on the CT scan at the time – on the day of the accident.

[188] Dr. McConkey cited in his report a 2009 academic study with respect to whiplash injury from the Journal of Bone and Joint Surgery British Volume. When asked about it in cross-examination, he did not specifically accept the paper as "authoritative", but agreed that it was "respected" and published in a high level journal. However, he disagreed with one of the propositions of the paper – a conclusion that the suggestion that a claimant's symptoms will improve after litigation is completed is "unsupported by the literature". Rather, Dr. McConkey expressed the view that "it is well known in the musculoskeletal community that secondary gain factors such as open lawsuits" or WSBC claims "substantially affect people's demonstration of symptoms".

[189] Dr. McConkey agreed on cross-examination that a soft tissue injury to tissues around a part of the body with an arthritic condition can aggravate that condition, but went on to say that "I do not believe in most cases that an acute soft tissue injury without documentation of severe injury is unlikely to change the course of the disease in most cases".

[190] With respect to the knee injury, Dr. McConkey opined on cross-examination that the dynamics of a rear-end collision are such that an injury to the knee against the dashboard is unlikely to occur. Even if it did, his view was that an acute inflammatory episode in the knee might cause some pain, but that if the knee already had end-stage osteoarthritis, it would still lead to the need for a knee replacement.

[191] All that said, Dr. McConkey heavily discounted the possibility that the knee was injured in the collision, saying that "there's no evidence that the accident caused trauma to his knee, except for the words of the person who is suing for his injuries in this accident". He relied heavily on the fact that neither the hospital records from the day of the MVA or Dr. Rauh's medical records from a few days later reflected knee issues. He acknowledged that knee pain was identified in massage therapy records on August 29, 2015, and that there was a reference to right knee issues arising from the "previous contact with motor vehicle" in Dr. Rauh's notes of September 14, 2015.

[192] In addition, Dr. McConkey's notes of the history he took from Mr. Mantei include that Mr. Mantei told him that "within days" he noted pain in various areas including his right knee.

[193] Dr. McConkey explained that in his view:

> … there is a – there's a bias towards suggestion that – that everything hurts for whatever reason in the next year after an accident must be related to the accident. So I saw no documentation within a week or a few days of July 26th of his knee having a bruise on it, being swollen, being acutely painful, him reporting a limp, et cetera.

[194] Dr. McConkey acknowledged that he did not get the details of the sporting activities that Mr. Mantei was participating in in the months leading up the MVA. He also acknowledged that a "loose body" in the knee could cause some degree of locking and pain in the knee, but discounted the likelihood of that having occurred in this case.

Mr. Bruce Hunt – Kinesiologist

[195] Mr. Hunt is a certified exercise physiologist, registered kinesiologist and functional evaluator and work capacity evaluator. He performed a physical capacity and work tolerance assessment of Mr. Mantei on December 17, 2019. This was, as noted above, about three months prior to Mr. Mantei's decision to retire from VFRS, and four months after his knee replacement.

[196] Mr. Mantei was assessed for a number of dynamic body movements, including sitting, standing, walking, bending from the waist, reaching, handling, and various dexterity activities. The planned tests were structured to become increasingly challenging, and Mr. Hunt reported that some of them were "deferred for safety". He concluded that Mr. Mantei was not then capable of meeting the full active duty and occupational demands of a Battalion Chief or of an active firefighter, and lacked the cognitive durability and stamina to meet the managerial demands of a full-time management position (like Assistant Chief).

[197] Mr. Hunt commented that Mr. Mantei could work as a training officer on a part-time basis (he suggested two days a week, four-to-six hours a day).

[198] On cross-examination, Mr. Hunt was asked whether Mr. Mantei's knee issues were a significant factor in terms of his inability to meet the physical demands of firefighting. Mr. Hunt expressed the view that while the knee was a compounding factor, it was the lower back pain that caused issues with walking stairs.

Issues

[199] The issues before the court are to determine the nature and extent of Mr. Mantei's injuries arising from the MVA and to assess damages.

Credibility and Reliability

[200] Reliability and credibility are related but distinct concepts. The distinction between them was considered in *R. v. Morrissey*, [1995] O.J. No. 639, 22 O.R. (3d) 514 (C.A.) at para. 35, cited in *United States v. Bennett*, 2014 BCCA 145 at para. 23:

> Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. ...

[201] In considering credibility, the evidence of a witness must be assessed for "its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 at 357 (C.A.).

[202] A frequently cited list of factors in assessing evidence as to both the veracity of a witness and the accuracy of that witness' evidence is found in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296. It includes:

a) The ability and opportunity of the witness to observe events;

b) The firmness of their memory;

c) Their ability to resist the influence of interest to modify their recollection;

d) Whether their evidence harmonizes with independent evidence that has been accepted;

e) Whether the witness changes their evidence during cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in their recollection;

f) Whether their evidence seems generally unreasonable, impossible or unlikely;

g) Whether the witness has a motive to lie; and

h) The demeanour of the witness generally.

[203] A trier of fact may accept none, part or all of a witness' evidence and may attach different weight to different parts of a witness' evidence: *Gill Tech Framing Ltd. v. Gill*, 2012 BCSC 1913 at para. 28.

[204] In *Edmondson v. Payer*, 2011 BCSC 118 at paras. 31-34, N. Smith J. dealt with a situation in which numerous minor issues were seized on to attack a plaintiff's credibility:

> [31] In *Diack v. Bardsley* (1983), 46 B.C.L.R. 240, 25 C.C.L.T. 159 (S.C.) [cited to B.C.L.R.], aff'd (1984), 31 C.C.L.T. 308 (C.A.), McEachern C.J.S.C., as he then was, referred to differences between the evidence of a party at trial and what was said by that party on examination for discovery, at 247:
>
> > ... I wish to say that I place absolutely no reliance upon the minor variations between the defendant's discovery and his evidence. Lawyers tend to pounce upon these semantical differences but their usefulness is limited because witnesses seldom speak with much precision at discovery, and they are understandably surprised when they find lawyers placing so much stress on precise words spoken on previous occasions.
>
> [32] That observation applies with even greater force to statements in clinical records, which are usually 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. There is no record of the questions that elicited the recorded statements.
>
> …
>
> [34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff 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 he or she must have said what the doctor wrote.
>
> [35] Further 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. As Parrett J. said in *Burke-Pietramala v. Samad*, 2004 BCSC 470, at paragraph 104:
>
> > ...the reports are those of a layperson going through a traumatic and difficult time and one for which she is seeing little, if any, hope for improvement. Secondly, the histories are those recorded by different doctors who may well have had different perspectives and different

> perceptions of what is important. ... I find little surprising in the variations of the plaintiff's history in this case, particularly given the human tendency to reconsider, review and summarize history in light of new information.

[205] To similar effect are the comments of N. Smith J. in *Carvalho v. Angotti*, 2007 BCSC 1760 at paras. 15-17:

> [15] The attack on the plaintiff's credibility is based, in part, on various contradictions and inconsistencies within her evidence at trial and between that evidence and her discovery evidence, documents she prepared for other purposes, or statements recorded in clinical records. It is a rare case of this kind where such inconsistencies cannot be found. By the time a personal injury case gets to trial, the plaintiff typically will have provided information to a number of people - including doctors, adjusters and disability insurers - on a number of occasions over a period of years. This provides fertile ground for cross-examination precisely because very few people will have perfect and identical recollection on each of those occasions.
>
> [16] The record created on many of those earlier occasions may consist of answers a plaintiff gave to questioners who were primarily interested in only part of what the plaintiff had to say. For example, a doctor treating a plaintiff for a specific injury may seek only very general information about aspects of the plaintiff's medical history unrelated to the injury that doctor is treating. The information recorded may only be a brief summary or paraphrase of what the plaintiff said. The plaintiff will usually have no specific recollection of what he or she said on that occasion, but, when confronted with the record on cross-examination, will usually agree with the suggestion: "That is what you told Dr. X, isn't it?" The danger of giving too much weight to such inconsistencies was noted by Parrett J. in ***Burke-Pietramala v. Samad***, …
>
> [17] Although there are inconsistencies in the plaintiff's evidence, I am satisfied that she was attempting to tell the truth as she recalls it. Those inconsistencies may cause me to question the accuracy of her recollection on some points, but they come nowhere near to being a basis for a finding of outright and deliberate dishonesty.

[206] The plaintiff argues that the evidence of Mr. Mantei and of the various other lay witnesses was both credible and reliable.

[207] The defendant does not take issue with Mr. Mantei's credibility *per se*, but rather argues that there are issues as to the reliability of Mr. Mantei's evidence. The defendant argues that litigation was a significant concern for the plaintiff throughout, that the plaintiff was focused on the litigation during his visits to the various medical professionals, and that he likely inaccurately attributed all of his symptoms to the MVA in the course of seeking treatment. The defendant refers in support of this to

various references in the notes of Dr. Rauh and other medical caregivers to the fact that Mr. Mantei was being assessed for independent medical examinations and participating in other litigation-related activities, and that he found some of those stressful.

[208] More specifically, the defendant argues that Mr. Mantei has downplayed the contribution of his pre-existing knee condition to the symptoms he exhibited in the years after the MVA, and that he similarly downplayed the underlying psychological issues arising from his many years of trauma as a firefighter.

[209] In my view, Mr. Mantei was both credible and reliable as a witness. On both direct and cross-examination, he gave answers that were responsive. He gave his evidence carefully and with a reasonable amount of detail notwithstanding that more than seven years had passed between the MVA and the trial. Mr. Mantei's recollection was generally good, his evidence was generally consistent with the documentary record, and to the extent there were any departures from the various clinical records or, in two cases, from his examination for discovery evidence, those were minor variations of the sort discussed in *Edmondson* and *Carvalho*.

[210] In particular, I accept Mr. Mantei's evidence as to his physical condition and the activities he participated in during the time period leading up to the MVA. I also accept his evidence that he was not suffering from PTSD symptoms of any significance prior to the MVA. I also accept his evidence that he began to experience significant knee pain shortly after the MVA. I also accept that his plan, prior to the MVA, was to work to age 59, and that his goal was to do so at the assistant chief level.

[211] The other non-expert witnesses were primarily Mr. Mantei's family members and former work colleagues. The evidence of Mr. Mantei's former VFRS colleagues painted a consistent picture of his work as a firefighter, captain, trainer and Union officer. I found all of them both credible and reliable. I similarly found Mr. Mantei's family members (his wife, brother and daughter) to be both credible and reliable. I

found the evidence of Mr. Mantei's daughter, Lauren, as to the changes in her father's personality to be sincere and compelling.

Causation, Injuries and Prognosis

Legal Principles

[212] The general test for causation, for which the leading case is *Athey v. Leonati*, [1996] 3 S.C.R. 458, [1996] S.C.J. No. 102, was concisely summarized by Kent J. in *Kallstrom v. Yip*, 2016 BCSC 829 at para. 318:

> 1. the general, but not necessarily conclusive test for causation is the "but for" test requiring the plaintiff show his injury and loss would not have occurred but for the negligence of the defendant;
> 2. this causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense;
> 3. it is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long as it is it is part of the cause of an injury, the defendant is liable; and
> 4. apportionment does not lie between tortious causes and non-tortious causes of the injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he is not responsible also helped to produce the harm.
>
> [Emphasis in original.]

[213] In *Athey* at paras. 32-35, Major J. noted the following key legal principles:

> [32] …The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss….
>
> …
>
> [34] The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though

> the plaintiff's losses are more dramatic than they would be for the average person.
>
> [35] The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage… Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award… This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.
>
> [Citations omitted.]

[214] These principles were further explained by Chief Justice McLachlin in *Blackwater v. Plint*, 2005 SCC 58 at paras. 78-81:

> [78] It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*. Mr. Barney's submissions that injury from traumas other than the sexual assault should not be excluded amount to the contention that once a tortious act has been found to be a material cause of injury, the defendant becomes liable for all damages complained of after, whether or not the defendant was responsible for those damages.
>
> [79] At the same time, the defendant takes his victim as he finds him — the thin skull rule. Here the victim suffered trauma before coming to AIRS. The question then becomes: What was the effect of the sexual assault on him, in his already damaged condition? The damages are damages caused by the sexual assaults, not the prior condition. However, it is necessary to consider the prior condition to determine what loss was caused by the assaults. Therefore, to the extent that the evidence shows that the effect of the sexual assaults would have been greater because of his pre-existing injury, that pre-existing condition can be taken into account in assessing damages.
>
> [80] Where a second wrongful act or contributory negligence of the plaintiff occurs after or along with the first wrongful act, yet another scenario, sometimes called the "crumbling skull" scenario, may arise. Each tortfeasor

> is entitled to have the consequences of the acts of the other tortfeasor taken into account. The defendant must compensate for the damages it actually caused but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. This means that the damages of the tortfeasor may be reduced by reason of other contributing causes: *Athey*, at paras. 32-36.
>
> [81] All these scenarios flow from the basic principle that damages must seek to put the plaintiff in the position he or she would have been in but for the tort for which the defendant is liable.

Positions of the Parties

Plaintiff

[215] The plaintiff says that, but for the MVA, he would not be suffering from ongoing and debilitating neck pain, lower back pain, shoulder pain, headaches, balance problems (including vertigo), difficulty concentrating, mild neurocognitive disorder, major depression with anxious distress and psychotic features, PTSD and somatic symptom disorder.

[216] The plaintiff further argues that, while his pre-existing knee issues would have eventually resulted in the need for a knee replacement regardless of the MVA, the injuries suffered in the MVA resulted in the acceleration and aggravation of the symptoms in the knee which meant that the knee reconstruction occurred earlier and the pain symptoms were more pronounced prior the surgery. The plaintiff notes the evidence of both Mr. Mantei and his wife of pain in the knee shortly after the MVA, and that the evidence indicates that prior to the MVA, Mr. Mantei was able to function normally with a high level of activity – something that his knee pain prevented him from doing after the MVA. The plaintiff submits that Dr. Zarkadas' opinion with respect to this issue should be preferred to that of Dr. McConkey.

[217] In any event, the plaintiff submits that Mr. Mantei's knee symptoms were a relatively minor part of the complex constellation of issues he faced after the accident. Mr. Mantei suggests that, absent the MVA, he would have eventually had the TKR surgery, and might have ended up on modified duties for a period of time, but otherwise would have been able to continue his career as a firefighter.

[218] With respect to neck pain, Mr. Mantei argues that he suffered a soft tissue injury that has resulted in ongoing myofascial pain, that there was no evidence of any pain or symptoms in his neck prior to the MVA, and that any assertion that his previously asymptomatic cervical spine would have been rendered significantly symptomatic is in the realm of speculation.

[219] With respect to PTSD and other psychological issues, Mr. Mantei submits that any suggestion that he would have been rendered psychologically symptomatic even in the absence of the MVA is not supported by any expert opinion and is also in the realm of speculation.

Defendant

[220] The defendant references *White v. Stonestreet*, 2006 BCSC 801 at para. 75, where Justice Ehrcke commented:

> [75] In searching for causes, a temporal connection is sometimes the only thing to go on. But if a mere temporal connection is going to form the basis for a conclusion about the cause of an event, then it is important to examine that temporal connection carefully. Just how close are the events in time? Were there other events happening around the same time, or even closer in time, that would provide an alternate, and more accurate, explanation of the true cause?

[221] The defendant suggests that any symptom not referenced either in the hospital records from the day of the MVA or in Dr. Rauh's notes from the day after the MVA should be viewed with caution. The defendant notes that Dr. Rauh did not record a concussion or a knee injury in his notes until Mr. Mantei's second post-MVA visit, which did not occur until September 2015.

[222] The defendant further argues that Mr. Mantei was able to return to work within a few months of the MVA, and subsequently completed the necessary 96 shifts and obtained a promotion to confirmed Battalion Chief.

[223] The defendant argues that Mr. Mantei did not report any psychological symptoms for several months after the MVA, and that as a result the court should conclude that any psychological injury is simply an aggravation of the trauma that is

inherent in work as a first responder. The defendant says that were other traumas subsequent to the MVA, including things Mr. Mantei was exposed to in his ongoing work as a firefighter as well as:

a) The death of his father in September 2016,

b) His daughters moving away from home in 2018, and

c) The early 2020 suicide of a fellow firefighter whom he saw as a mentor.

[224] The defendant argues that any knee issues reflect a pre-existing condition that was going to be painful and ultimately require surgery in any event. The defendant submits that there was a substantial possibility that Mr. Mantei would have had to take time away from work even in the absence of the MVA, given the advanced stage of osteoarthritis in his knee. The medical reports that connect the knee issues to the MVA all assume that the knee was injured in the MVA – which the defendant says is not established on the evidence.

[225] The defendant submits that any contribution of the MVA to Mr. Mantei's decision to retire in April 2020 is *de minimis*. The defendant argues that Mr. Mantei worked for a very accommodating employer, and that he had other options short of retirement including working in a different role. The defendant argues that it is "highly improbable" that Mr. Mantei would have continued to work past April 1, 2020, regardless of the accident, given that:

a) He was only 1.5 years away from having completed 35 years of service,

b) His pension contributions over the remaining period would have made only a minor difference to his income,

c) So long as he continued to work, he would be at risk of exposure to further trauma, and

d) His post-MVA diagnoses of diabetes, sleep apnea and hypertension.

[226] The defendant suggests that, even if the court doesn't agree that Mr. Mantei would have retired in April 2020, it should conclude that he would have retired in December 2021 in any event, given what the defendant describes as a "maxed out" pension by that time.

[227] The defendant submits that Mr. Mantei's allegation that the defendant had admitted to hitting him at 100 km/hour should be doubted given that Mr. Mantei failed to call the defendant as a witness at trial, or to have obtained discovery evidence in advance of the trial. In any event, the defendant submits that should the court find that the defendant's vehicle was travelling at a high rate of speed at the time of the MVA, it should draw no inference from that; rather, the defendant argues that it is within the experience of the court that an accident of a minor nature can cause an injury, and conversely a much more severe accident can result in little or no injury.

[228] The defendant also suggests that the court should take into consideration what is said to be a real and substantial possibility that the knee surgery might not have been successful.

[229] Finally, the defendant submits that there should be a contingency deduction to reflect Mr. Mantei's pre-existing conditions, including his osteoarthritis in his right knee and neck. The defendant argues that there is a substantial possibility Mr. Mantei would have needed knee surgery in 2019 in any event.

[230] The defendant also submits that there was a substantial possibility that Mr. Mantei would have been subject to severe psychological symptoms even in the absence of the MVA, as a result of the various traumas inherent in his work as a firefighter. The defendant submits that an inference to this effect can be drawn from Dr. Wilkinson's evidence.

[231] The defendant submits that there should be a contingency deduction of 50% from any award for non-pecuniary damages, past wage loss, future wage loss and special damages to account for these pre-existing issues, relying on *Khudabux v.*

McClary, 2016 BCSC 1886 at paras. 205-206 and *Boyetchko v. Mentias*, 2021 BCSC 172 at para. 174.

[232] The plaintiff also argues that there should be a 10% deduction from any award for failure to mitigate, based on the plaintiff's failure to pursue treatment by a psychiatrist (as distinct from his ongoing treatments with the various psychologists and his family doctor).

Analysis

[233] Many of the defendant's submissions are premised on parts of Mr. Mantei's evidence not being accepted. As noted above, I have found Mr. Mantei to be a credible witness and accept his evidence including as to matters key to questions of causation.

[234] The defendant's submissions also rely substantially on the opinion of Dr. McConkey. I had significant concerns about Dr. McConkey's evidence. Dr. McConkey had strong views on credibility, but it appeared to me that those views were not based on specific issues with respect to Mr. Mantei but rather were rooted in his views of plaintiffs in personal injury lawsuits generally. As noted above, I found Mr. Mantei to be a credible witness which significantly undercuts Dr. McConkey's opinions. Dr. McConkey's opinions were also based in part on his views of the dynamics of a rear-end crash which, in my view, is properly the domain of an engineer rather than an orthopaedic surgeon. More generally, I prefer the evidence of Dr. Waseem with respect to the soft tissue injuries – a matter I see more within his specific expertise – and as between the two orthopaedic surgeons I found Dr. Zarkadas to be the more objective.

[235] I will deal first with Mr. Mantei's physical condition at the time of the MVA. At that time, he was fit and very active. I accept his evidence that he was engaged in several sports, and regularly climbing the Grouse Grind. He would not have engaged in those activities had there been significant knee or neck pain. As a result, while imaging at the time of the MVA indicated some degenerative changes in the cervical spine, I conclude that there was no symptomatic neck condition and no reason to

believe it would become symptomatic in the foreseeable future. In my view, there was no real and substantial possibility of this occurring.

[236] With respect to the knee, I accept that imaging from 2017 showed significant osteoarthritis in the knee, and that such osteoarthritis is an expected consequence of Mr. Mantei's 1991 ACL reconstruction. I conclude that although Mr. Mantei was not experiencing any significant pain in or limitations with respect to the right knee in the months leading up to the MVA, he would have eventually begun to experience some degree of pain and would eventually have required TKR surgery. As I assess the evidence, there is no basis to conclude that the osteoarthritis would have progressed as quickly as it did, so the knee reconstruction would not likely have been required in 2019. However, given that Mr. Mantei intended to work until age 59 – nearly nine more years after the MVA – I conclude that it is most likely that he would have required that knee reconstruction at a time when he was still employed by the VFRS.

[237] Finally, I conclude that Mr. Mantei was not experiencing any significant nightmares or other PTSD symptoms prior the MVA. While he, like any other first responder, will have observed traumatic situations, and had some susceptibility to having PTSD triggered, I conclude based on the evidence of Dr. Kiraly that triggering would mostly likely result from some sort of significant trauma to self. Given that Mr. Mantei had worked as a first responder for over 29 years without significant issues, it is my view that the likelihood of that occurring is speculative and does not reach the threshold of a real and substantial possibility.

[238] I conclude that there is no basis to conclude that any of the other musculoskeletal, cognitive or psychological conditions that affected Mr. Mantei after the MVA would have been part of his without accident course. I accept the evidence that Mr. Mantei's post-concussion symptoms from his 2000 accident had almost fully resolved within four or five years, and had no further impact on his function in 2015.

[239] Thus, while Mr. Mantei may have had increased susceptibility to neck issues, PTSD and post-concussion symptoms, this is a “thin skull” situation with respect to those conditions.

[240] I conclude that, but for the MVA, the plaintiff would not be suffering from neck and shoulder pain, lower back pain, headaches, balance problems, difficulty with concentration, and the various disorders diagnosed by Dr. Kiraly (mild neurocognitive disorder, major depression with anxious distress and psychotic features, PTSD and somatic symptom disorder).

[241] I also conclude that the injuries suffered in the MVA led to the aggravation of Mr. Mantei’s osteoarthritis and accelerated the progression leading to his need for TKR surgery.

[242] I accept that Mr. Mantei’s prognosis for further improvement is poor. I note that there is a conflict between Drs. Waseem and Zarkadas, on the one hand, and Dr. McConkey, on the other, as to the likelihood of Mr. Mantei’s shoulder responding to specific treatments. Dr. McConkey’s assertion that the shoulder is treatable, with minimal explanation, is difficult to accept, given that more than seven years that had passed between the MVA and trial. I accept the opinions of Drs. Waseem and Zarkadas on this matter.

[243] I do not accept that there needs to be an overall contingency deduction to the awards as a whole. With respect to mitigation, it is my view that Mr. Mantei sought and obtained a significant amount of psychological treatment from multiple counsellors as well as from Dr. Rauh, including anti-depressant medication. While he had not, at the time of trial, been separately under the treatment of a psychiatrist, in my view Mr. Mantei’s efforts to deal with his psychological symptoms have overall been reasonable and I would not reduce his claim with respect to the lack of treatment by a psychiatrist.

[244] I will consider specific contingencies in respect of the claims for past and future wage loss.

Remoteness

[245] The above comments focus on the question of cause in fact. The defendant also made submissions on the question of remoteness, sometimes known as “cause in law”. The remoteness inquiry considers whether, even if the but for test establishes cause in fact, the harm is too unrelated to the wrongful conduct to hold the defendant fairly liable: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 12. In *Mustapha*, the discussion focused on cases of “exceptional frailty” or where there are “unusual or extreme reactions” to events caused by negligence (paras. 14-16).

[246] The defendant argues that he “could not have foreseen that a firefighter with 30 years experience in dealing with all manner of traumatic incidents would have reacted so strongly to an event (i.e. the MVA) which was comparably innocuous”, and that it was not reasonably foreseeable that Mr. Mantei would retire as a consequence of the MVA.

[247] In my view, this argument is without merit. It is foreseeable when a person driving a motor vehicle rear-ends another vehicle that injury will be caused to the driver, that the injuries may be both physical and psychological, and that the injuries – whether physical or psychological or both – may impact on the injured person’s ability to carry on employment. While I have accepted that Mr. Mantei had some degree of increased susceptibility to neck issues, PTSD and post-concussion symptoms, I do not see that increased susceptibility as out of the ordinary. Mr. Mantei has not displayed exceptional frailty or extreme reactions. The injuries Mr. Mantei has suffered, and their impacts on him, are well within the scope of reasonable foreseeability.

Damages

Non-Pecuniary Damages

Legal Principles

[248] Both parties directed my attention to the judgment of Kirkpatrick J.A. in *Stapley v. Hejslet*, 2006 BCCA 34, at paras. 45-46:

> [45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, supra, at 637 is a helpful reminder:
>
> > Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).
>
> [46] The inexhaustive list of common factors cited in Boyd that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list.
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[249] *Stapley* reminds the court that, in assessing non-pecuniary damages, one must consider the particular plaintiff, in their particular circumstances, and make an award that accommodates those unique circumstances.

Positions of the Parties

[250] The plaintiff submits that an appropriate award in this case would be $190,000. The plaintiff bases its submission on three cases that it says are comparable:

a) *Balint v. Lewandowski*, 2021 BCSC 1316. Ms. Balint was 51 at the time of a motor vehicle accident that left her unable to continue her work as a self-employed housecleaner. Justice Coval concluded that she had suffered constant pain since the accident, which developed into central pain sensitization, somatic symptom disorder, and severe depression. Her daily function was severely limited, she suffered negative side-effects from pain medication, and suffered anxiety and hopelessness about the future. Non-pecuniary damages were assessed at $175,000.

b) *Chaudhry v. John Doe*, 2017 BCSC 1895. Mr. Chaudry was 43 at the time of a hit-and-run accident in 2010 and had recently begun work as a real estate agent. He suffered neck and back pain, which had largely resolved by the time of trial, but he continued to suffer chronic headaches, tinnitus, dizziness, sleep problems, fatigue, anxiety, depression and symptoms akin to PTSD. Non-pecuniary damages were assessed at $185,000, which would be approximately $216,000 in 2022 dollars.

c) *Cornish v. Khunkhun*, 2015 BCSC 52. Ms. Cornish was 58 years old at the time of a motor vehicle accident. She had worked as an in-home care aide. She suffered from headaches, pain in her neck, shoulder and back, as well as vertigo, dizziness, confusion, significant memory issues, forgetfulness and depression. Non-pecuniary damages were assessed at $160,000, which would be approximately $192,000 in 2022 dollars.

[251] The defendant argued that the appropriate range for non-pecuniary damages was $80,000 to $100,000, and identified three cases it said were comparable:

a) *Partridge v. Buskop*, 2019 BCSC 459. Ms. Partridge was a medical transcriber and was 56 years old at the time of her accident. She had pre-existing anxiety and depression, with significant absenteeism at work in the four years prior to the accident. Medical issues from a prior accident in 2004 had never completely resolved. Justice Morellato concluded that Ms. Partridge suffered soft tissue injuries to her neck, right shoulder, mid-back and lower back regions, which exacerbated previous injuries. Her pre-existing depression, anxiety and PTSD-like symptoms, as well as incidents of dizziness and headaches, were exacerbated for a period of time. However, Justice Morellato concluded that the plaintiff's condition had, within two years of the 2013 accident, reverted to her pre-accident condition. Non-pecuniary damages were assessed at $90,000.

b) *Abraha v. Suri*, 2019 BCSC 1855. Ms. Abraha, who was 48 at the time of her accident and had been in good health, suffered injuries to her neck and back, developed depression, anxiety and memory problems, and became irritable and short-tempered. Non-pecuniary damages were assessed at $70,000.

c) *Lafond v. Mandair*, 2017 BCSC 523. Mr. Lafond was 51 years old at the time of his accident. Justice Dley concluded that he had suffered chronic soft tissue injuries to his neck, shoulder and back, as well as cognitive deficits, including depression and anxiety. He also concluded that there was some prospect of improvement in these conditions. Non-pecuniary damages were assessed at $100,000.

[252] The defendant argued that *Partridge* was the most comparable of the three cases. The defendant submitted that any of Mr. Mantei's cognitive issues are predominantly psychological, that he had pre-existing knee issues, that he had

underlying trauma from his work as a firefighter, and that he continued to experience other traumas after the MVA.

Analysis

[253] In my view, the plaintiff's cases are more comparable to the situation of Mr. Mantei when one considers the changes to his condition that I have found to be caused by the MVA. I accept that the diagnosis of central pain sensitization in *Balint* arguably goes beyond Mr. Mantei's diagnoses; however, there are significant parallels between Mr. Mantei's condition and those of the plaintiffs in *Chaudhry* and *Cornish*. I see *Lafond* as the most comparable of the defendant's cases, although I see the range of conditions described by Justice Dley in *Lafond* as less extensive than in this case, and see the difference in prognosis as a distinguishing feature.

[254] In this case, Mr. Mantei's physical and psychological symptoms have deprived him of the career he loves as well as the highly active lifestyle that he enjoyed before the MVA, and significantly impacted his relationships with those most important to him.

[255] Having considered my conclusions on causation, the cases provided to me by the parties, and the various factors discussed in *Stapley*, I would assess non-pecuniary damages in this case at $175,000.

Loss of Earning Capacity

[256] Mr. Mantei's claim for loss of earning capacity – particularly in the seven years between the MVA and the trial – was a major focus of submissions at trial. Each party tendered expert evidence to assist the court in assessing the underlying financial issues with respect to the loss of earning capacity claims, including calculations of lump-sum present values for any future lost income streams.

Expert Evidence – Economists

Christiane Clark

[257] Ms. Clark is an economist with specific expertise in labour economics. She prepared a total of four reports – although one was prepared for a 2020 trial date that did not proceed and was superceded by a new report made in July 2022. The three reports that were the focus of her evidence were:

a) A report dated July 18, 2022, providing estimates of earnings from employment (both before and after the date of trial) as well as estimates of the values of various non-wage benefits, including pension benefits;

b) A response report dated September 15, 2022, dealing with comments made by the other economist, Mr. Gosling, in his report; and

c) A report providing present value calculations for the cost of care items and services listed in a report of Mr. Bruce Hunt. This report relates to the claim for cost of future care and will be discussed below.

[258] Ms. Clark was instructed by counsel to prepare her report based on assumptions as to certain alternative scenarios. One scenario was to assume that Mr. Mantei would, in the absence of the MVA, have continued to work as a Battalion Chief from the date of his actual confirmation in that position (May 12, 2017) until he turned 59 years of age. The other scenario was to assume that Mr. Mantei would have been promoted to the position of Assistant Chief by August 1, 2020.

[259] Ms. Clark was also instructed to make two different assumptions with respect to the deductibility of pension benefits. In one scenario, she calculated losses based on the pension benefits received being deductible; in the other, she calculated losses on the assumptions they were not deductible. She acknowledged that whether pension benefits are deductible is a legal issue that the court will have to decide.

[260] Ms. Clark's reports with respect to Mr. Mantei's income were limited to his earnings from VFRS. Her reports did not consider any income available to him from work with the Union or from coaching soccer. She did, however, provide multiplier tables that could be used to calculate the present value of any future loss of such income based on the 1.5% discount rate applicable to wage loss claims.

[261] In addition, Ms. Clark's estimates with respect to loss of past earnings did not take into account the value of the sick pay that Mr. Mantei received. Rather, her calculation of "with accident earnings" included all income reported on Mr. Mantei's T4 statement from VFRS, which included pay for time worked, sick days and also vacation days. Her estimates of without accident earnings included Mr. Mantei's traditional levels of committee and training work, overtime, and other additional pay on top of his base salary.

[262] Ms. Clark's estimates did take into account the value of non-wage benefits that Mr. Mantei received from VFRS, including a supplemental pension allowance ("SPA"). It is clear from her report and her evidence that she had carefully reviewed the collective agreement as part of preparing her report.

[263] Ms. Clark's response report of September 15, 2022, accepted certain of the technical comments of Mr. Gosling and updated her income loss calculations. In her evidence, she directed the court to the revised tables in the September 15, 2022, report as providing the most accurate calculations. Dealing solely with past employment income from VFRS, she estimated the losses as follows:

Estimates of Past Earnings (and Losses)

Year	Without Accident Earnings Assuming Position of: Battalion Chief	Without Accident Earnings Assuming Position of: Assistant Fire Chief *	With Accident Earnings	Loss of Earnings, Assuming Position of: Battalion Chief	Loss of Earnings, Assuming Position of: Assistant Fire Chief *
(1)	(2)	(3)	(4)	(5)	(6)
2016	$114,988	$114,988	$107,978	$7,009	$7,009
2017	$129,116	$129,116	$120,031	$9,085	$9,085
2018	$138,809	$138,809	$133,503	$5,306	$5,306
2019	$142,277	$142,277	$135,913	$6,364	$6,364
2020	$145,834	$146,703	$39,613	$106,221	$107,090
2021	$149,479	$156,238	$0	$149,479	$156,238
2022 (to trial)	$115,898	$121,138	$0	$115,898	$121,138
Total:	**$936,401**	**$949,268**	**$537,038**	**$399,363**	**$412,230**
			net of income tax and EI premiums:	*$301,168*	*$309,090*

* from August 2020 onward

[264] Ms. Clark provided the following summary table showing her overall calculations. [She used the phrase “MPP benefits” to reference Mr. Mantei’s pension benefits which are provided by the Municipal Pension Plan.]:

Summary Estimates of Total Loss of Earnings and Non-Wage Benefits

- "With Accident": Retirement as Battalion Chief on April 1, 2020

Loss Component	Without Accident: Scenario 1 Battalion Chief To Age 59 If early retirement benefits are: deductible	Scenario 1 Battalion Chief To Age 59 If early retirement benefits are: not deductible	Scenario 2 Assistant Fire Chief To Age 59 If early retirement benefits are: deductible	Scenario 2 Assistant Fire Chief To Age 59 If early retirement benefits are: not deductible
(1)	(2)	(3)	(4)	(5)
Past Losses				
Loss of Earnings, net of tax and EI	$301,168	$301,168	$309,090	$309,090
Loss of SPA	$2,236	$2,236	$2,308	$2,308
(Gain) of MPP Benefits, net of tax	($178,225)	$0	($178,225)	$0
Loss of Other Benefits	$4,242	$4,242	$4,242	$4,242
Total Past Losses	**$129,422**	**$307,646**	**$137,416**	**$315,640**
Present Value of Future Losses				
Loss of Earnings	$248,883	$248,883	$260,136	$260,136
Loss of SPA	$1,394	$1,394	$1,457	$1,457
Loss of MPP Benefits	$24,908	$178,349	$101,246	$254,689
Loss of Other Benefits	$3,665	$3,665	$3,665	$3,665
Total Future Losses	**$278,847**	**$432,290**	**$366,504**	**$519,947**
Total Losses (Past and Future)	**$408,269**	**$739,936**	**$503,919**	**$835,587**

[265] This table includes her calculation of both past income loss and the present value of future losses.

[266] On cross-examination, Ms. Clark acknowledged that there was a change in pension terms at the end of 2021, and one of the changes was such that if Mr. Mantei had retired after December 31, 2021, his pension would be based on his best four years of income rather than the best five years.

Mark Gosling

[267] Mr. Gosling is also an economist, with experience in estimating economic damages in personal injury and fatal accident cases. He provided a report dated August 31, 2022, that commented on Ms. Clark's loss of earnings report dated July 18, 2022.

[268] Mr. Gosling provided some technical comments on Ms. Clark's calculations. Many of them were accepted by her in her September 15, 2022, report and are reflected in the tables I have quoted above. The main remaining calculation differences between them are that:

a) Mr. Gosling estimated a deduction for taxes of 29-30%, while Ms. Clark estimated the deduction at 25-26%; and

b) The two experts were approximately $5,000 off in their calculation of Mr. Mantei's with-accident pension contributions.

[269] In addition to commenting on Ms. Clark's calculations, Mr. Gosling was instructed to perform his own calculations based on a different assumption as to Mr. Mantei's retirement date – that is, that Mr. Mantei would have retired on December 1, 2021, within days after he had reached 35 years of pensionable service.

[270] Mr. Gosling opines that, if this assumption is made, then there is no future loss of income as the retirement date occurred before the trial. [This may not be completely accurate, given that Mr. Mantei would have had a higher best five-year-income level upon which the pensions would be based.]

[271] Based on this assumption, Mr. Gosling calculated Mr. Mantei's past wage loss (excluding any consideration of pension benefits) on a gross basis as $271,008 if Mr. Mantei had remained a Battalion Chief or $278,073 if he had become an Assistant Fire Chief. Ms. Clark, in her response report, agreed with these numbers. With respect to the loss net of taxes, Mr. Gosling calculated $197,324 (Battalion Chief) and $201,790 (Assistant Fire Chief). Ms. Clark, in her response report, calculated these numbers as $207,958 and $212,501 respectively.

[272] Mr. Gosling provided his calculation of the summary overall past wage loss based on the December 1, 2021 retirement date. Ms. Clark provided her numbers which are, across the board, approximately $15,000 higher than Mr. Gosling's. Of the difference, approximately $10,000 relates to the above-noted difference in net past wage losses, while the remaining amount of just under $5,000 reflects a difference in the calculation of loss of pension benefits.

[273] Ms. Clark's table showing her estimates of total losses, based on a retirement date of December 1, 2021, is as follows:

Summary Estimates of Total Loss of Earnings and Non-Wage Benefits
- "Without Accident": Retirement on December 1, 2021
- "With Accident": Retirement as Battalion Chief on April 1, 2020

	Without Accident Pension from Apr 2020 to Nov 2021			
	Is Deductible		Is Not Deductible	
Loss Component	Battalion Chief	Assistant Fire Chief	Battalion Chief	Assistant Fire Chief
(1)	(2)	(3)	(4)	(5)
Past Loss of Earnings, net of tax and EI	$207,958	$212,501	$207,958	$212,501
Loss of SPA	$1,518	$1,557	$1,518	$1,557
Loss of Other Benefits	$2,830	$2,830	$2,830	$2,830
Loss of MPP Benefits	$38,392	$58,697	$153,999	$174,304
Total Losses	**$250,698**	**$275,585**	**$366,304**	**$391,192**

[274] Mr. Gosling's calculations show the entries for "Loss of MPP Benefits" as:

a) Battalion Chief / Deductible - $33,533;

b) Assistant Fire Chief / Deductible - $53,696;

c) Battalion Chief / Non-Deductible - $150,520; and

d) Assistant Fire Chief / Non-Deductible - $170,682.

[275] As I read Mr. Gosling's report, and particularly Table B which breaks out these calculations for Loss of MPP benefits, it appears that most if not all of the lost pension benefits he calculates are future (i.e. post-trial).

Legal Principles – Past Income Loss

[276] A claim for past income loss is a claim for loss of capacity, as explained in *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30:

> [30] Thus, in my view, a claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury.

[277] In assessing loss of earning capacity, the onus is on the plaintiff to show that the injuries resulting from the accident have impaired the plaintiff's income earning ability, such that there is a real and substantial possibility that the reduced earning capacity has resulted in pecuniary loss: *Rusu v. Willowbrook Motors Ltd.*, 2022 BCSC 1117 at para. 99.

[278] In order to determine this loss of capacity, it is necessary to consider what the plaintiff's income would have been absent the accident. This is, in effect, a past hypothetical event. Like all hypothetical events, it is based on an assessment of real and substantial possibilities and not mere speculation: *Smith v. Knudsen*, 2004 BCCA 613 at para. 24.

[279] Once a real and substantial likelihood of a pecuniary loss has been established, the court assesses damages based on its assessment of the degree of likelihood of the particular loss, combined with an assessment of the value of the loss: *Sendher v. Wong*, 2014 BCSC 140 at para. 162.

[280] An award is assessed, rather than calculated mathematically. It should make allowances for contingencies where appropriate. It must be fair and reasonable

taking into account all of the circumstances: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 178.

[281] The parties acknowledge that a plaintiff is only entitled to recover the net amount of lost income: *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, s. 98. The reports of Ms. Clark and Mr. Gosling have both provided calculations of past income loss on a net basis, but to the extent I adopt conclusions that differ from the calculations they have provided, there may need to be adjustments to reflect tax consequences.

Legal Principles – Loss of Future Earning Capacity

[282] The task of assessing a claim for loss of earning capacity was described by Justice Dickson (as he then was) in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 1978 CanLII 1 at 251:

> We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings,* [[1966] S.C.R. 532]. A capital asset has been lost: What was its value?

[283] Assessing a party's loss of future earning capacity therefore involves comparing a plaintiff's likely future, had the accident not happened, to their future after the accident. This assessment depends on the type and severity of the plaintiff's injuries, and the nature of the anticipated employment in issue: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7.

[284] The fundamental goal is, to the extent possible, to put the plaintiff in the position he would have been but for the injuries caused by the defendant's negligence: *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133.

[285] The proper approach to assessing future loss of income-earning capacity was canvassed by the Court of Appeal in *Rab v. Prescott*, 2021 BCCA 345, where at para. 47, Justice Grauer set out the following three-step process:

> [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence

> indicates no loss of income at the time of trial. The first is evidentiary: Whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras 93–95.

Tripartite Test – Step One

[286] Step one requires consideration of whether the evidence establishes a potential future "event" that could lead to a loss of capacity such as a chronic injury.

[287] In *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.) at para. 8, the court set out four factors that may be considered:

> [8] The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:
>
> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
> 2. The plaintiff is less marketable or attractive as an employee to potential employers;
> 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
> 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[288] With respect to the *Brown* factors, Grauer J.A. stated the following in *Rab*:

> [36] ... these considerations are not to be taken as means for assessing the dollar value of a future loss; they provide no formula of that nature. Rather, they comprise means of assessing whether there has been an impairment of the capital asset, which will then be helpful in assessing the value of the lost asset.

Tripartite Test – Step Two

[289] The plaintiff is not entitled to an award for loss of earning capacity if there is not a real and substantial possibility of a future event leading to income loss: *Ploskon-Ciesla* at para. 14. Thus, the second step of the tripartite test involves

determining whether there is a "real and substantial possibility" of a future event leading to a pecuniary loss: *Rab* at para. 47. This "… is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative": *Gao v. Dietrich*, 2018 BCCA 372 at para. 34.

[290] In describing the "real and substantial possibility" threshold in *Rab*, Grauer J.A. stated at para. 28:

> [28] Difficult as it is, that task is a necessary first step in the analysis of whether a plaintiff has established a claim for loss of future earning capacity. This was explained by Mr. Justice Goepel, dissenting but not on this point, in *Grewal v. Naumann*, 2017 BCCA 158:
>
> > [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[291] In *Dornan v. Silva*, 2021 BCCA 228, Grauer J.A. concluded at para. 75 that:

> [75] … to support a contingency deduction, the law does not require that the "measurable risk" involved be wholly inherent in the plaintiff's pre-existing condition, without the need for any external event to act upon it in order to give rise to a debilitating effect. The question is whether, given the pre-existing condition, there was a real and substantial possibility of future debilitating symptoms absent the accident. That real and substantial possibility may arise solely from the nature of the pre-existing condition itself, or require an external event acting upon that condition. In either case, the possibility must be real and substantial, not speculative.

[292] He continued at paras. 92-95 to note that:

> [92] …The importance of evidence in cases involving a specific contingency was discussed in *Graham* (and cited with approval by this Court in *Hussack*):
>
> > 46 …[C]ontingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, e.g., a particularly marketable skill or a poor work record. The former type of

> contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, where a trial judge directs his or her mind to the existence of these general contingencies, the trial judge must remember that everyone's life has "ups" as well as "downs". A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.
>
> 47 If a plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility: *Schrump v. Koot*, supra, at p. 343 O.R.
>
> [Emphasis added.]
>
> [93] The process, then, as discussed above at paras 63–64, is one of determining whether, on the evidence, the contingency or risk in question is a real and substantial possibility. If it is, then the process becomes one of assessing its relative likelihood, as we saw from the excerpt from *Athey* quoted above at paragraph 64.
>
> [94] It follows that here the judge was required to engage in three different kinds of assessments. The first concerned what had happened to the appellant in the past, which had to be proved on a balance of probabilities. The second concerned what might happen to the appellant in the future, which possibilities, as discussed in *Athey*, could be taken into account only to the extent they were found to be real and substantial possibilities. …
>
> [95] Once the hypothetical event in question was found to be a real and substantial possibility, it became incumbent upon the judge to undertake the third assessment: the relative likelihood of that possibility.

[293] In *Lo v. Vos*, 2021 BCCA 421, the plaintiff had developed severe depressive symptoms after the motor vehicle accident. The trial judge reduced the award of damages based on a “real and substantial possibility” that the plaintiff would have developed depression after the collision anyway as a result of pre-existing back pain. The Court of Appeal concluded that nothing in the evidence in the case was capable of supporting that conclusion, commenting at paras. 71, 74-75 and 78-79:

> [71] I observe at the outset that no expert in this case suggested that, absent the accident, the appellant was at risk of developing a major depressive disorder, or any of the other psychological problems that the appellant experienced after the accident, and which were found to be the cause of her continuing disability. There was no evidence of a risk of a natural (i.e., without accident) progression from the pre-existing state to the relevant future hypothetical event.

> …
>
> [74] The existence of a specific contingency such as was found here must be proven by evidence that is capable of supporting the conclusion that the occurrence of the contingency is a real and substantial possibility, as opposed to a speculative possibility: *Graham* at 15; *Hussack v Chilliwack School District No. 33*, 2011 BCCA 258.
>
> [75] In my respectful view, nothing in the evidence in this case is capable of supporting that conclusion. There was no indication that the appellant had any inherent vulnerability to mental health problems because of her without-accident state. Instead, on the evidence, it took a particular combination of factors that began with the appellant's pre-existing condition, but also required the impact of the injuries caused by the accident in the form of (1) soft tissue and acute injuries leading to (2) a condition of chronic pain that, (3) when combined with PTSD arising from the accident, resulted in (4) the development of generalized anxiety disorder and major depressive disorder.
>
> …
>
> [78] I should add that it is, of course, essential to consider a plaintiff's pre-existing state, such as the appellant's low back problems here, in the assessment of damages. That is part of her original state, and distinguishes her from someone whose original state was free of any physical problems. But whether her original state gave rise to a measurable risk of a future hypothetical event is a different question, requiring additional evidence.
>
> [79] In the circumstances before us, it is my respectful view that the evidence was not capable of establishing, as found by the judge, a measurable risk that the appellant "would have developed a major depressive disorder consequent on chronic lower back pain even without the accident". That is no more than speculation.

[294] Thus, the trial judge's reasons reflected a palpable and overriding error. The Court of Appeal substituted the trial judge's award of $225,000 for loss of earning capacity with an award of $810,000.

Tripartite Test – Step Three

[295] The third and final step of the tripartite analysis involves assessing the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring.

[296] With respect to assessing loss of future earning capacity, there are two established approaches: (1) the "earnings approach"; and (2) the "capital asset approach": *Rab* at paras. 66-68; *Grewal* at para. 48; and *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Both approaches are correct, but apply in different situations.

[297] The earnings approach is more straightforward, and is applicable when the loss is easily measurable: *Perren* at para. 32. For example, when an accident results in injuries that render the plaintiff unable to work at the time of trial, and for the foreseeable future: *Ploskon-Ciesla* at para. 11.

[298] The capital asset approach is less clear-cut, and is more appropriate when the loss "is not measurable in a pecuniary way": *Perren* at para. 12. For example, in instances where the 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: *Ploskon-Ciesla* at para. 11.

[299] The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation: *Pololos* at para. 133. The questions of reasonableness and fairness of an award should be reviewed at the end of the assessment, once the real and substantial possibilities that are identified have been assessed and a preliminary conclusion has been reached: *Lo* at para. 117.

Legal Principles – Collateral Benefits

[300] A collateral benefit arises when a source other than the damages payable by the defendant ameliorates the loss suffered by the plaintiff as a result of the defendant's breach of legal duty: *IBM Canada Limited v. Waterman*, 2013 SCC 70 at para. 20. The question that arises is whether some compensating advantage that was in fact received, generally as a result of arrangements made before the breach, should be taken into account in assessing the plaintiff's damages: *IBM Canada* at para. 22. Concerns arise where the receipt of the benefit arguably constitutes a form of excess recovery for the plaintiff's loss, and is connected in some way to the defendant's breach of legal duty: *IBM Canada* at para. 23.

Sick Leave Benefits and Vacation Days

[301] The plaintiff claims the value of sick leave and vacation leave benefits that he was paid by the VFRS, relying on a series of well-established authorities.

[302] In a leading case, *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359, 1994 CanLII 120, the court decided three cases involving plaintiffs who had been injured in motor vehicle accidents and who, while off work, had collected disability benefits pursuant to collective agreements with their respective employers. The main issue on appeal was whether those benefits should be deducted from the wage loss claims. The court concluded they should not, on the basis that such benefits – although forming part of a collective agreement for the employment of union members – are in the nature of private insurance, ultimately paid for at least in part by the employee through the give-and-take of collective bargaining and, in some cases, through payroll deductions for a part of the premiums.

[303] As explained by Justice Cory, who wrote the majority judgment:

> I think the exemption for the private policy of insurance should be maintained. It has a long history. It is understood and accepted. There has never been any confusion as to when it should be applied. More importantly it is based on fairness. All who insure themselves for disability benefits are displaying wisdom and forethought in making provision for the continuation of some income in case of disabling injury or illness. The acquisition of the policy has social benefits for those insured, their dependants and indeed their community. It represents forbearance and self-denial on the part of the purchaser of the policy to provide for contingencies. The individual may never make a claim on the policy and the premiums paid may be a total loss. Yet the policy provides security.
>
> Recovery in tort is dependent on the plaintiff establishing injury and loss resulting from an act of misfeasance or nonfeasance on the part of the defendant, the tortfeasor. I can see no reason why a tortfeasor should benefit from the sacrifices made by a plaintiff in obtaining an insurance policy to provide for lost wages. Tort recovery is based on some wrongdoing. It makes little sense for a wrongdoer to benefit from the private act of forethought and sacrifice of the plaintiff.

[304] Justice Cory concluded that the exception should apply in the collective bargaining context, explaining at pp. 403-04 that:

> To say that the exception applies only to private insurance, where actual premiums are paid to the insurance company, would create barriers that are unfair and artificial. It would mean that top management and professionals who could well afford to purchase their own insurance would have the benefit of the insurance exception, while those who made the same provision and made relatively greater financial sacrifices to provide for the disability payments through their collective bargaining agreement would be denied the

> benefits of the insurance exception. This would be manifestly unfair. There is no basis for such a socially regressive distinction.
>
> Union representation and collective bargaining are recognized as a means for working people to protect their interests. The benefits for which employees have bargained in good faith should not be sacrificed simply because the mode of payment for the disability benefit is different from that in private insurance contracts. Where evidence is adduced that an employee-plaintiff has paid in some manner for his or her benefits under a collective agreement or contract of employment, the insurance exception should apply. It would be unjust to deprive employees of the benefits which, through prudence and thrift, they have provided for themselves.

[305] Sick leave benefits are only deductible if the sick leave was caused by the MVA: *Boyle v. Prentice*, 2010 BCSC 1212 at para. 34.

[306] The questions of quantification and of contingencies were discussed in *Bjarnason v. Parks*, 2009 BCSC 48 at paras. 56 and 59-61:

> [56] This court has long recognized the loss of sick bank credits as a compensable loss …
>
> …
>
> [59] The case authorities do not appear to support a universal approach to the quantification of the loss flowing from the depletion of sick leave benefits. For example, in *Collins v. Ma*, 1990 CanLII 1634 (B.C.S.C.), the court endorsed a contingency calculation being applied in order to take into consideration the likelihood of an employee drawing on the lost banked sick days in the future. That approach was followed by the court in *Olson v. Nixon*, [1991] B.C.J. No. 155, 1991 CarswellBC 1346 (S.C.).
>
> [60] In *Roberts*, however, Clancy J. made no deduction for contingencies. Likewise, more recently in *Choromanski v. Malaspina University College*, 2002 BCSC 771, the court rejected the defence argument that there should be a reduction of the loss taken based on the plaintiff's work history and the rate at which he had traditionally availed himself of his sick benefits.
>
> [61] In my view, whether it is appropriate to make deductions for contingencies in quantifying the loss will depend upon the presence or absence of certain factors. Those would include, for example, whether there is a maximum limit of accumulated sick leave, whether the plaintiff is able to cash out accumulated sick leave days on termination or retirement, whether the plaintiff has several years of employment remaining in which to potentially use the sick leave or has only a few months of employment left until retirement with a significant sick leave remaining, or whether the plaintiff has left the employment in which he earned the sick day credits altogether. It cannot be predicted with any degree of certainty whether a person who is healthy today will be so tomorrow. Illness or injury can afflict any one of us at any time. Placing much if any reliance on the plaintiff's past use of sick benefits strikes me as an unsound and potentially unfair approach because it

> fails to adequately protect a plaintiff against an unexpected serious or catastrophic illness in the future which could occur in any otherwise healthy plaintiff, or against a future injury, which, by its nature, is unpredictable. In neither case would those future events necessarily be related to the plaintiff's past use of sick benefits.

[307] The plaintiff alternatively advances the claim for the sick leave benefits on the basis of a subrogation clause in the collective bargaining agreement. That clause reads:

> Where an employee is paid his wages by the Employer while he is absent from his employment by reason of any disability other than one for which he would be entitled to receive Workers' Compensation benefits, and the employee subsequently recovers such wages or any part thereof from any source, then the employee shall pay the amount so recovered to the Employer. Upon the Employer receiving such amount it shall credit the employee paying the same with the number of days of sick leave proportionate to the amount so recovered and in addition thereto the number of days which the employee would have earned during the period of the disability but for such disability under the Gratuity Plan.

[308] An award for the value of lost wages for an employee of the City of Vancouver, in which a nearly identical clause was contained in the collective agreement, was made in *Watson v. Thompson*, [1991] B.C.J. No. 597, 1991 CanLII 1080 (S.C.).

[309] To the extent a subrogation clause applies, the question may no longer be one of a collateral benefit, as there is no longer a concern about the benefit constituting a form of excess recovery by the plaintiff. As explained in *IBM Canada* at para. 24:

> [24] For example, there is no excess recovery if the party supplying the benefit is subrogated to — that is, steps into the place of — the plaintiff and recovers the value of the benefit. In those circumstances, the defendant pays the damages he or she has caused, the party who supplied the benefit is reimbursed out of the damages and the plaintiff retains compensation only to the extent that he or she has actually suffered a loss

Pension Income

[310] The deductibility of pension payments is dealt with in *IBM Canada*, in which the plaintiff was terminated without cause at the age of 65, with a vested interest in

IBM's defined benefit pension plan. Upon termination, he was entitled to his full pension. The court found that the plaintiff was entitled to 20 months' notice of termination, and entitled to be paid his employment income for those 20 months. It concluded that the pension benefits that were paid to him during the notice period should not be deducted from the award. Justice Cromwell, writing for the majority, summarized his reasoning at paras. 2-4:

> [2] The question looks straightforward enough at first glance. The general rule is that contract damages should place the plaintiff in the economic position that he or she would have been in had the defendant performed the contract. IBM's obligation was to give Mr. Waterman reasonable notice of dismissal or pay in lieu of it. Had it given him reasonable working notice, he would have received only his regular salary and benefits during the period of notice. As it is, he in effect has received both his regular salary and his pension for that period. It therefore seems clear, under the general rule of contract damages, that the pension benefits should be deducted. Otherwise, Mr. Waterman is in a better economic position than he would have been in had there been no breach of contract.
>
> [3] On closer study, however, the question raised on appeal is not as simple as that. The case in fact raises one of the most difficult topics in the law of damages, namely when a "collateral benefit" or a "compensating advantage" received by a plaintiff should reduce the damages otherwise payable by a defendant. The law has long recognized that applying the general rule of damages strictly and inflexibly sometimes leads to unsatisfactory results. The question is how to identify the situations in which that is the case.
>
> [4] In my view, employee pension payments, including payments from a defined benefit plan as in this case, are a type of benefit that should generally not reduce the damages otherwise payable for wrongful dismissal. Both the nature of the benefit and the intention of the parties support this conclusion. Pension benefits are a form of deferred compensation for the employee's service and constitute a type of retirement savings. They are not intended to be an indemnity for wage loss due to unemployment. The parties could not have intended that the employee's retirement savings would be used to subsidize his or her wrongful dismissal. There is no decision of this Court in which a non-indemnity benefit to which the plaintiff has contributed, such as the pension benefits in issue here, has ever been deducted from a damages award.

[311] Justice Cromwell referenced at para. 16 the "insurance exception":

> [16] The principle that the defendant should compensate the plaintiff only for his or her actual loss is not, on its own, an answer to the problem. There are exceptions to the strict application of this principle, the most important of which is the exception for private insurance and other benefits which, for this purpose, are considered analogous to private insurance. That exception

> applies not only to insurance benefits in the strict sense, but also to other benefits such as pension payments to which an employee has contributed and which were not intended to be an indemnity for the type of loss suffered as a result of the defendant's breach.

[312] Justice Cromwell noted at para. 47 that retirement pension benefits had been held to fall within the private insurance exception. After canvassing a number of cases, at para. 76, he set out a series of conclusions:

> (a) There is no single marker to sort which benefits fall within the private insurance exception.
>
> (b) One widely accepted factor relates to the nature and purpose of the benefit. The more closely the benefit is, in nature and purpose, an indemnity against the type of loss caused by the defendant's breach, the stronger the case for deduction. The converse is also true.
>
> (c) Whether the plaintiff has contributed to the benefit remains a relevant consideration, although the basis for this is debatable.
>
> (d) In general, a benefit will not be deducted if it is *not an indemnity* for the loss caused by the breach and the plaintiff *has contributed* in order to obtain entitlement to it.
>
> (e) There is room in the analysis of the deduction issue for broader policy considerations such as the desirability of equal treatment of those in similar situations, the possibility of providing incentives for socially desirable conduct, and the need for clear rules that are easy to apply.

[313] The heart of his analysis is found at para. 77:

> [77] Where would these factors lead us in this case? In my view, they clearly support not deducting the retirement pension benefits from wrongful dismissal damages. The retirement pension is not an indemnity for wage loss, but rather a form of retirement savings. While the employer made all of the contributions to fund the plan, Mr. Waterman earned his entitlement to benefits through his years of service. As the plan states, its primary purpose is "to provide periodic pension payments to eligible employees . . . after retirement . . . in respect of their service as employees" …. Thus, it seems to me that this case falls into the category of cases in which the insurance exception has always been applied: the benefit is not an indemnity and the employee contributed to the benefit. This result is consistent with the dominant view in the case law and among legal scholars: …

[314] Thus, he concluded that Mr. Waterman's pension benefits fell within the private insurance exception and should not be deducted from the wrongful dismissal damages.

Positions of the Parties

Plaintiff

[315] The plaintiff submits that that but for the MVA, the plaintiff would have either:

a) been promoted to an Assistant Chief position by 2020, continuing in that position until age 59 (i.e. in May 2024), or

b) continued to work for VFRS as a Battalion Chief and as a Vice President of the Union until age 59.

[316] The plaintiff submits that the first of these options is the more likely, given his express desire to do so, the leadership roles he had undertaken both within the VFRS and with the Union, and the availability of assistant chief positions in areas in which Mr. Mantei had specific interest and experience.

[317] The plaintiff submits that, instead of either of those alternatives, he retired in April 2020 because of the injuries suffered in the MVA. The plaintiff submits that he acted reasonably in doing so after having made every effort over several years to continue his career.

[318] The plaintiff relies on the calculations of Ms. Clark with respect to past loss of earnings, with four adjustments:

a) An increase to reflect that the earnings he did receive from the VFRS included a significant amount of sick leave pay, which should not be deducted from any award,

b) A further increase to reflect that many of Mr. Mantei's vacation days were used as *de facto* sick days rather than for vacation purposes,

c) An increase to reflect the income Mr. Mantei would have earned from his work with the Union, and

d) An increase to reflect the income Mr. Mantei would have earned from coaching soccer.

[319] With respect to sick pay, the parties agree that Mr. Mantei was paid $242,714.76 in sick benefits from the time of the MVA to the date of his retirement. These benefits were paid to him as regular income, but the plaintiff submits that these benefits are in effect a disability plan negotiated as part of the collective agreement. The plaintiff notes that Mr. Mantei has directly paid premiums out of his payroll. Thus, the plaintiff submits that they fall within the principles set out in *Cunningham*, are non-deductible, and should be in essence "backed out" of Mr. Mantei's with accident income. This increases the loss by $242,714.76 net of tax and deductions. By my calculation, at 25.5% reduction, the amount is $180,822.

[320] The plaintiff submits in the alternative that these benefits are subject to a subrogation clause in favour of the City and that the plaintiff is entitled to recover them on that basis, and in accordance with *Watson*.

[321] Finally, the plaintiff argues that because Mr. Mantei used his vacation days as sick days, those vacation days should be treated in the same way as sick days. The plaintiff calculates that, from the date of the MVA to his retirement, Mr. Mantei was paid $147,358.79 in respect of vacation leave. Of that, some $35,824 was received from August 2, 2019 to the date of his retirement – at a time when he had already used of all of his available sick days.

[322] The plaintiff acknowledges that Mr. Mantei had his knee surgery in August 2019. The plaintiff submits that either (a) the surgery would have happened later in life, and not affected Mr. Mantei's pre-trial income, or (b) had he had the surgery while still working for VFRS, but for the MVA he would have been back to modified duties quickly after the surgery.

[323] The plaintiff also acknowledges that Mr. Mantei did take some actual vacations subsequent to the MVA. It argues that the award for lost vacation days

should thus be in the range of $35,824 to $130,000. By my calculation, this leads to a net income range from $26,689 to $96,850.

[324] With respect to union pay, the plaintiff submits that the award should be based on the average $19,409 that Mr. Mantei earned for his union work from 2014-2017. The plaintiff acknowledges that, had Mr. Mantei been promoted to Assistant Chief (a management position), he would have had to resign from any union position. The plaintiff submits that, had Mr. Mantei been promoted to Assistant Chief in 2020, the additional union income would have been $32,326.60 (based on two full years of union pay in 2018 and 2019, less the $6,491.40 that Mr. Mantei actually earned from the Union in 2018), or $24,083 net of 25.5% in taxes.

[325] The plaintiff argues that, had Mr. Mantei not been promoted but rather remained as a Battalion Chief, he would have remained on the Union executive until retirement. It submits that an additional 2.8 years of past income loss (2020 to October 2022) would then be added to the past income loss calculation under this assumption. It calculates this amount as $54,345 gross or $40,487 net income. [It also submits that a further award would have to be made for future income loss from the date of trial to the date of retirement. This will be considered below.]

[326] With respect to coaching income, the plaintiff notes that in 2014, Mr. Mantei coached two soccer teams and earned $19,500. He continued to coach until the spring of 2020, and then stopped. He had some discussions in the fall of 2020 with a different organization, which would have paid him $9,000 per team for two teams, as well as $50 per hour for additional training work at their academy, but Mr. Mantei concluded he was not in a position to take on that work.

[327] With respect to past income loss, the plaintiff submits that coaching income should be based on gross income of $28,000 up to the date of trial. This is said to acknowledge some reduction from his previous income as a result of the Covid-19 pandemic. The plaintiff submits that, net of 25.5% tax, this would give rise to a past loss claim of $20,860.

[328] Finally, the plaintiff submits that the pension payments that Mr. Mantei received to the date of trial are non-deductible on the basis of *IBM Canada*, and that as a result any award for past income loss should be calculated using the non-deductible columns from the economists' reports.

[329] Thus, the plaintiff's claim for past income loss is as follows:

a) If Mr. Mantei had remained as a Battalion Chief:

Loss of Earnings, SPA and other benefits (per Clark calculation) - $307,646

Sick benefits (net) - $180,822

Vacation days (net) - $26,689 to $96,850

Union income - $64,570

Soccer coaching - $20,860

Total - $600,587 to $670,748

b) If Mr. Mantei had been promoted to Assistant Chief in 2020:

Loss of Earnings, SPA and other benefits (per Clark calculation) - $315,640

Sick benefits - $180,822

Vacation days - $26,689 to $96,850

Union income $24,083

Soccer coaching - $20,860

Total - $568,094 to $638,255

[330] Turning to future loss of earning capacity, the plaintiff argues that the award should be determined based on the assumption that, absent the MVA, he would have worked with the VFRS until retiring at age 59, with his retirement income based on a higher income for his best years than he actually accomplished. As with the past income loss claim, the plaintiff argues that he would have either been appointed as an Assistant Chief by that time, or alternatively he would have continued on as a Battalion Chief and also continued to earn income from the Union.

[331] With respect to future income from Mr. Mantei's Union position, he argues that this should be calculated on the basis of $19,409 per year from trial to age 59,

for which the appropriate multiplier is 1.665 (from Ms. Clark's report), for a total of $32,315.

[332] The plaintiff also argues that he would have continued to earn income from coaching soccer as well. The plaintiff submits that it should be calculated on the assumption that he would continue to work until age 65, including academy work, and that he would be earning $20,000 per year. For eight years of future income, the appropriate multiplier is 7.4859, and the loss is thus $149,718.

Defendant

[333] The defendant made wide ranging submissions on the loss of income earning capacity.

[334] With respect to the plaintiff's likely course in the absence of the MVA, the defendant submitted that the plaintiff:

a) Would have retired on April 1, 2020, even in the absence of the MVA, or

b) In the alternative, would have retired at the latest when he had completed the full 35 years of pensionable service (i.e. in November 2021).

[335] The defendant submitted that, even if the plaintiff had at one point planned to work to age 59, the court should conclude that he would have retired much earlier given the following:

a) The plaintiff's pre-existing osteoarthritis in his knee was such that:

i. He would have had to take time away from work, both to manage the pain prior to surgery, to recover from the surgery, and as a result of reduced function in the knee post-surgery,

ii. There was a risk that the knee issues would have been career-ending even in the absence of the MVA, including a risk that the knee surgery might have been unsuccessful, and

iii. Given that the plaintiff retired within eight months of his knee surgery, the court should infer that he would have retired at or shortly after the time of his knee surgery even in the absence of the MVA;

b) The plaintiff's susceptibility to PTSD was such that the court should conclude that his PTSD would have been triggered even in the absence of the MVA, that the MVA was simply one of several incidents aggravating his PTSD to which it in fact made only a minimal contribution, and that as a result the court should conclude that he would have retired as a result of PTSD even in the absence of the MVA;

c) The plaintiff was, subsequent to the MVA, diagnosed with multiple new conditions: Type 2 diabetes, hypertension, and mild sleep apnea; and

d) By November 2021, the plaintiff would have accumulated 35 years of pensionable service, which the defendant says would mean that he had maximized his pension.

[336] The defendant submitted that the court should base its calculations on the plaintiff having worked as a Battalion Chief until retirement. The defendant argued that there was no evidence of any certainty that the plaintiff would be promoted to Assistant Fire Chief, particularly given that by 2020 he was already 55 years of age and only five years away from mandatory retirement – as a result, the possibility of promotion to Assistant Fire Chief was not compensable.

[337] The defendant says that, if the court accepts that the plaintiff would have retired on April 1, 2020, in any event, then there should be no award for loss of earning capacity. In the alternative, if it concludes that the plaintiff would have retired on December 1, 2021, then it should award income losses based on the calculations provided by Mr. Gosling.

[338] The defendant says that if the plaintiff does receive an award for loss of earning capacity, any such award should be subject to a contingency deduction for what is said to be a real and substantial possibility that one or more of the pre-

existing conditions would have decreased the plaintiff's ability to work or caused him to retire by April 2020 in any event. The defendant refers in this regard to the *Dornan* case, discussed below, where the Court found that the plaintiff was highly likely to suffer a further concussion in any event.

[339] With respect to the plaintiff's actual retirement, the defendant submits that the plaintiff worked for an accommodating employer and had other options short of retirement. The defendant notes that the plaintiff continued to work on and off for nearly five years after the MVA, and that there is no evidence from a vocational expert or from a neurologist supporting his decision to retire. The defendant argues that the plaintiff's decision to retire was not caused by the MVA. The defendant argues that the cumulative effect of other traumatic events at work between 2015 and 2017 better explains his PTSD symptoms than does the MVA, and argues that rather than pursuing a claim for loss of earning capacity in this action, the plaintiff should have filed a WSBC claim.

[340] The defendant argues that the plaintiff failed to mitigate any loss of earning capacity, as a result of:

a) His failure to pursue treatment by a psychiatrist;

b) His failure to seek an accommodated position within VFRS; and

c) His failure to return to coaching after his retirement and after rehabilitating his knee.

[341] With respect to the deductibility of sick benefits, the defendant made a lengthy submission to the effect that:

a) The plaintiff could have made a WSBC claim for his PTSD, particularly given that WSBC now deems PTSD symptoms in first responders to be work-related;

b) The plaintiff's trauma is clearly work-related, despite any contribution the court might find the MVA may have made to it;

c) The subrogation clause in the collective agreement applies only to a disability claim “other than one for which he would be entitled to receive Workers’ Compensation benefits”,

d) The defendant submits that the subrogation clause is worded in such a way that “the defendant is only a secondary payer if the claim is not approved by Worksafe BC”.

[342] More generally, the defendant submits that there is limited evidence to show that the plaintiff was required to take time off work for medical reasons, or that those reasons were caused by the MVA, and that as a result the plaintiff had not met the burden of proof on this matter.

[343] The defendant further submits that there would need to be an adjustment to any award of sick leave benefits so that only an after-tax amount was awarded.

[344] Finally, with respect to sick leave benefits, the defendant submits that compensating the plaintiff for these benefits would lead to an injustice if there is a real and substantial possibility that the plaintiff would have had to use sick days in any event. The defendant argues that a negative contingency should be applied as suggested in *Bjarnason*.

[345] With respect to the use of vacation days, the defendant submits that the plaintiff has not proven that any vacation days were used for injuries caused by the MVA.

[346] With respect to coaching income, the defendant argues that the plaintiff would have been unlikely to continue with coaching soccer due to his knee issues. The defendant also argues that, given the on-and-off nature of this work, and that it was not a primary focus of the plaintiff’s employment, the maximum award that should be made for loss of coaching income is one year’s income.

[347] With respect to the plaintiff’s claim for pension loss, the defendant argues that before any collateral benefit issue arises, the plaintiff must show that absent the

MVA he would not have retired on April 1, 2020. For the reasons set out above, the defendant argues that has not been shown.

[348] With respect to loss of future earning capacity, the defendant reiterates his arguments above that:

a) While the plaintiff may have planned to work to age 59, many plans in life do not come to fruition and the court needs to apply contingencies to any such claim; and

b) The MVA had a *de minimis* contribution to any decision to retire, which the defendant asserts was properly attributable to other issues.

[349] The defendant then submits that, if there is to be an award for loss of future earning capacity, it should be either a nominal award or at most a capital award based on one year of pre-accident earnings, adjusted for contingency deductions. In any event, the defendant argues that any claim for loss of future earning capacity should be limited to the period up to the plaintiff's age 59, given that is when he intended to retire.

Analysis

VFRS Position and Retirement

[350] I begin by returning to my consideration of causation issues in connection with what has happened to Mr. Mantei subsequent to the MVA. As noted above, I concluded that but for the MVA, the plaintiff would not be suffering from neck and shoulder pain, lower back pain, headaches, balance problems, difficulty with concentration, and the various disorders diagnosed by Dr. Kiraly (mild neurocognitive disorder, major depression with anxious distress and psychotic features, PTSD and somatic symptom disorder).

[351] In my view, these conditions were the primary cause of Mr. Mantei's retirement. While I accept that Mr. Mantei was able to work enough in 2016 and early 2017 to complete the required shifts to become a confirmed Battalion Chief,

that in my view reflects sheer determination and stoicism rather than a lack of career-threatening injury, as well as the impact of progressive worsening of his knee and psychological symptoms. I do not accept that there has been an intervening cause that would break the causal link between the MVA and Mr. Mantei's decision to retire.

[352] In my view, Mr. Mantei's decision to retire on April 1, 2020, was reasonable, given the complex set of physical, cognitive and psychological symptoms he was experiencing in early 2020.

[353] Fundamental to the claims for both past and future loss of earning capacity is a conclusion as to a hypothetical event – the plaintiff's likely course absent the MVA.

[354] I consider first the likelihood that the plaintiff would have been promoted to Assistant Chief in or about 2020. In my view, there is a real and substantial possibility that would have happened. I say this in light of Mr. Mantei's expressed goal of reaching management levels, his steady progression through the ranks in the years leading up to the MVA, his determined pursuit of a confirmed Battalion Chief position as he worked through his injuries post-MVA, the leadership roles he undertook on the safety committee, with respect to training upcoming officers, and in the Union, the fact that he had obtained his confirmed Battalion Chief position at the age of 52 and would have been in his mid-50s when applying for Assistant Chief positions (a time when he would have still had several years before mandatory retirement), the fact that he was invited for an interview for the one Assistant Chief position he applied for, the number of available positions in or about 2019-2020 that Mr. Mantei did not apply for because of health reasons, the fact that some of those positions included focuses on operations, safety and training – areas in which Mr. Mantei had a special interest and had developed a strong reputation – all of these factors lead to a conclusion that there was a real and substantial possibility that he would have obtained a promotion to Assistant Chief. I would assess that possibility at 50%.

[355] I note in passing that the net financial impact on damages of a promotion to Assistant Chief is actually relatively small, given that if promoted Mr. Mantei would have been required to leave the Union and would have lost the income he earned from his work with the Union.

[356] I turn next to the question of when Mr. Mantei would have retired absent the MVA. I accept Mr. Mantei's evidence that his plan prior to the MVA was to work to age 59. That makes sense to me given his passion for the work of a firefighter, his clear desire to keep on moving up the ranks and his belief that he could make a difference. His identity was very much tied into his role as a firefighter and, at least prior to the MVA, he clearly obtained great satisfaction from that work. It also gave him flexibility to carry on his other passions of coaching and various athletic activities. That schedule matched his wife's desire to pursue her career as a bank manager and build up her own pension entitlement with her employer (having taken time away from work earlier in her career).

[357] It also makes sense given Mr. Mantei's anticipated career trajectory and his pension entitlement. He had identified an Assistant Chief position as a career goal, which included a salary higher than that of a Battalion Chief. Thus, while Mr. Mantei would have reached 35 years of active service by the end of November 2021, qualifying for a full pension, the quantum of that pension would be determined by the best five years of service (subsequently reduced to the best four years of service). To maximize his pension, Mr. Mantei would have to work those five (or four) years at the Assistant Chief position. Had he been appointed Assistant Chief in 2019 or 2020, that would mean he would reach that threshold by the time he was 59 years of age.

[358] That said, I accept that there is a possibility that Mr. Mantei might have changed his plans. I see that as being slightly more likely if Mr. Mantei was unsuccessful in obtaining promotion to Assistant Chief, particularly if he had completed several years as a Battalion Chief, had concluded he would not be promoted further, and if his knee issues were to begin to affect his enjoyment of his work. As noted above, I conclude that it is most likely that Mr. Mantei would have

required knee reconstruction surgery at a time when he was still employed by the VFRS – albeit at a later date than he actually received it. He would, as a result, have been required to draw on his sick leave benefits for a period of time. I note as well that the evidence indicated that a Battalion Chief position has more demanding requirements for physical activity than an Assistant Chief.

[359] I see the possibility of early retirement as less likely than the possibility of continuing to work to age 59, given Mr. Mantei's passion for his work, the determination he showed in obtaining his necessary shifts to become a confirmed Battalion Chief, and the financial consequences of retiring earlier. If Mr. Mantei was not promoted, and if he had become a confirmed Battalion Chief in either 2016 or 2017, then he would have completed the necessary years at that position to maximize his pension at a Battalion Chief salary level by 2021 or 2022. While the reality is that the likelihood of him retiring early would increase each year (and perhaps even each month) from 2021 to 2024, it is my view that the complex financial modelling that would be required to calculate a variety of interim stages is unnecessary in order to assess damages. In my view, it would be appropriate to use the calculations provided to me for a December 1, 2021 retirement date, and assess the likelihood of retirement on that date as 20%.

[360] Based on the evidence presented, I do not see the risk of Mr. Mantei's knee issue becoming career-ending, including by way of unsuccessful surgery, as being significant. To use the language of *Dornan*, it is a speculative as opposed to a realistic possibility. To the extent that any such risk exists, it is incorporated into the 20% possibility of retirement in December 2021.

[361] Nor do I see it as appropriate to draw any inferences for purposes of this analysis from the fact that the plaintiff retired some eight months after his knee surgery. He did so because of a conglomeration of physical, cognitive and psychological issues, and he saw his recovery from the knee surgery as one of the few positives within that conglomeration of issues.

[362] On the evidence, I do not see there being a separate real and substantial possibility that the plaintiff would have been forced to retire as a result of PTSD being triggered by some other incident, even in the absence of the MVA. I accept that some (but not all) of the nightmares the plaintiff began to experience in the years after the MVA related to work matters. The evidence, however, indicates that this is not unusual – when a person has PTSD-related nightmares, they may well relate to various traumas the person has experienced. In my view, there is no non-speculative basis in the evidence to conclude that Mr. Mantei would have been triggered to experience PTSD symptoms in the absence of the MVA.

[363] With respect to new conditions with which the plaintiff was diagnosed after the MVA (Type 2 diabetes, hypertension and mild sleep apnea), there was little or no opinion evidence directly addressing those conditions – rather, the diagnoses were reflected in Dr. Rauh's clinical notes and some witnesses were asked about their awareness of those diagnoses. Nothing in the evidence explored whether there was any connection between those conditions and Mr. Mantei's sudden change in lifestyle at the time of the MVA, moving from a highly active lifestyle to one that was highly sedentary. Nothing in the evidence suggested that Mr. Mantei had any issues managing his diabetes and hypertension, and nothing in the evidence suggested that his sleep apnea required treatment. In my view, there is no basis in the evidence to draw any conclusion that these conditions created a real and substantial possibility that Mr. Mantei would have retired earlier.

[364] In my view, the 20% contingency I have already identified with respect to the possibility of retirement in December 2021 adequately captures the possible impacts on Mr. Mantei's post-accident course of the risks of PTSD, diabetes, hypertension and sleep apnea.

[365] Turning to quantification, it is my view that the earnings approach is appropriate in this case given that the plaintiff was in an established career with some 30 years of history, with ascertainable salary levels and a detailed collective agreement setting out the terms of employment.

[366] I also conclude that this case falls within the principles confirmed in *IBM Canada* and, as a result, to the extent the plaintiff received pension benefits where he would have, absent the MVA, been earning income, those benefits are not deductible. As well, I have concluded that there was a 50% possibility that Mr. Mantei would have been promoted to Assistant Chief. As a result, I would adopt the calculations in columns (3) and (5) of the second of Ms. Clark's tables above, which calculate the combination of past and future loss of VFRS income at $739,936 and $835,587 respectively. Given the 50% contingency, I would use the average of these numbers which is $787,762, representing the value on the assumption that Mr. Mantei would have retired at age 59.

[367] To consider the 20% possibility that Mr. Mantei would have retired on December 1, 2021, I turn to the third table above, and use columns (4) and (5) which represent a non-deductible pension. The average of these two numbers ($366,304 and $391,192) is $378,748. I note that Ms. Clark's calculations of these numbers were approximately $15,000 higher than Mr. Gosling's. The difference was not fully explained, and to represent an approximate average of their two calculations, I would reduce the number from $378,748 to $371,248.

[368] By my calculation, applying an 80% contingency to the $787,762 number and a 20% contingency to the $371,248 number, I calculate loss of income from VFRS as $704,459, which I would round up to $705,000.

Union Income

[369] I conclude that, in the absence of the MVA, and had the plaintiff not been promoted to Assistant Chief (which is a non-union, management position), he would have continued his work as a Vice President of the Union. He had been doing that work for several years and nothing in the evidence suggested there was likely to be any change to that (other than by way of promotion to a management position).

[370] I also conclude that the plaintiff's retirement from the Union was a result of his inability to perform at the level he had performed prior to the MVA, which resulted

from psychological and cognitive issues arising from the MVA. The plaintiff is thus entitled to an award for loss of this income.

[371] I accept that it is appropriate to calculate an award for loss of Union income on the basis of the average $19,409 annual income identified in the plaintiff's submission. I would adopt the two numbers for past income loss ($64,570 if Mr. Mantei not promoted, $24,083 if promoted) as calculated by the plaintiff and summarized above. By my calculation, assuming that Mr. Mantei continued with the Union only until the end of November 2021, then the additional Union income earned in 2020 and 2021 would be 1.9*$19,409*0.745=$27,473, meaning that the net past income loss, if it is assumed that Mr. Mantei continued as a Battalion Chief until a December 1, 2021 retirement, is $51,556. Applying contingencies of 40%, 50% and 10% to these numbers, I calculate the amount to be awarded for past loss of Union income as $43,025.

[372] With respect to future income loss, the circumstances in which Mr. Mantei would have future Union income (i.e. continuing as a Battalion Chief to age 59) have an overall 40% likelihood. Applying this contingency to the $32,315 calculated by the plaintiff, the amount I calculate is $12,926.

[373] This leads to a total amount of $55,951 in respect of loss of income from the Union, which I would round up to $56,000.

Mitigation

[374] I have already dealt with the defendant's submission that there should be a deduction for the plaintiff's alleged failure to mitigate his loss as a result of a failure to pursue treatment by a psychiatrist.

[375] The defendant also argues that the plaintiff should have sought an accommodated position within the VFRS. In my view, the plaintiff did seek accommodated work for a number of months leading up to his retirement, but his psychological and cognitive issues were such that it was reasonable for him not to pursue those options further.

[376] With respect to coaching, I accept Mr. Mantei's evidence – which was confirmed by two of his former assistant coaches – that the coaching approaches and values that had led to his success over the years were no longer possible for him. On the evidence, it was not just his knee issues that limited his ability to coach. I note as well the inconsistency between the defendant alleging (a) that the plaintiff's failure to continue coaching is a failure to mitigate, and (b) that the plaintiff's claim for loss of coaching income should fail because he would in any event have been unable to continue due to his knee issues.

[377] I would make no deduction from the award for failure to mitigate. It is my view that Mr. Mantei tried for nearly five years to find a way to continue the career he loved. In my view, his decision to retire was reasonable, as was his decision not to return to coaching.

Sick Leave Benefits

[378] I conclude that the sick leave benefits in this case are of a nature that falls within the principles outlined in *Cunningham*. To the extent the taking of sick days was caused by the MVA, and subject to any contingencies, it is a collateral benefit that would not be deductible.

[379] With respect to the defendant's argument that the plaintiff could have made a WSBC claim with respect to his PTSD, it is my view that even if that was open to the plaintiff, that does not affect any rights of the defendant. The law as summarized above makes clear that if there is a subrogated claim (in this case, to the benefit of the City and VFRS), then the defendant is liable for the value of the sick leave benefits. If there is no subrogated claim, then the sick leave benefits are a collateral benefit and the defendant is still liable for them. I do not see anything in the subrogation clause in the collective agreement that would make the defendant "only a secondary payer if the claim is not approved by Worksafe BC". The defendant is a stranger to the relationships between the plaintiff, his employer, and WSBC, and is not entitled to benefit from that.

[380] In my view, there is adequate evidence to show that the great majority of the sick days taken by the plaintiff arose from issues related to the MVA.

[381] As set out above, the plaintiff would eventually have required knee replacement surgery even in the absence of the MVA – although it may not have been required until later, I conclude that it would most likely have been required before the plaintiff reached the age of 59. As a result, it is my view that a contingency should be applied. It appears that the recovery time for the plaintiff was in the range of four-to-six months. In my view, it would be appropriate to apply a contingency of approximately 1/3 of the value of the benefits (just over $180,000).

[382] In my view, an appropriate award for the sick leave benefits used by the plaintiff is $120,000.

Vacation Pay

[383] The plaintiff's vacation benefits are provided for in the collective agreement, and presumably arise from the give-and-take of a collective bargaining process, so the theoretical underpinnings do appear to fall within the scope of *Cunningham* and related cases.

[384] I see it as more difficult to identify a causal connection between vacation day use and the MVA. It is clear that the plaintiff did use much of his vacation time for vacation purposes – there was evidence of two cruises, as well as time spent camping in the summer. As well, to the extent that some of the vacation days taken by the plaintiff were used to rest and relax at home, those days likely had a dual purpose of both vacation and recovery. I think a stronger case can be made for the vacation days used after the plaintiff had exhausted all available sick days. That is, however, only a small part of the amount claimed.

[385] I would award $20,000 for vacation days used in lieu of sick days.

Soccer Coaching Income

[386] The plaintiff's passion for coaching dates back to his teenaged years. Given his long history as a coach, and the success he had achieved, it is my view that he would have continued to coach for as long as he was reasonably able to do so.

[387] In my view, the plaintiff would have missed four-to-six months of coaching income in connection with his knee surgery. I do not accept that there was a real and substantial possibility that his knee surgery would have required him to leave coaching.

[388] In my view, absent the MVA, it is likely that Mr. Mantei would have had renewed enthusiasm for coaching soccer after he retired and had more time available to him. I thus see it as unlikely that he would have ceased coaching at or shortly after his retirement from VFRS. That said, his daughter gave evidence that she always expected him to coach any children she might have, and I could see him being attracted to unpaid coaching work involving any grandchildren that might ultimately reduce the time he was wiling to spend on paid coaching positions.

[389] Notwithstanding the incomplete discussions that Mr. Mantei had with Coastal FC in the fall of 2020, it is my view that the $19,000 or so he had earned over the years leading up to 2020 is the most appropriate basis for projections as to what is income would have been. In order to account for the possibility that paid coaching work might tail off between ages 60 and 65, I would assess damages based on retirement from paid coaching work in the late spring of 2028 (i.e. around the time he would turn 63).

[390] I would assess damages at the $20,860 sought by the plaintiff for past income loss (i.e. mid-2020 to mid-2022), then six more years at $19,000 with a multiplier of 5.6972 which calculates at $108,247, less $10,000 to reflect time off in respect of the knee surgery.

[391] I would award the sum of $119,000 for lost capacity to earn coaching income.

Summary

[392] The award for loss of earning capacity (both past and future) is as follows:

a) VFRS income - $705,000

b) Union income – $56,000

c) Sick benefits - $120,000

d) Vacation pay - $20,000

e) Coaching income - $119,000

for a total of $1,020,000.

Cost of Future Care

Legal Principles

[393] The purpose of an award for the cost of future care is to restore the injured party to the position they would have been in, but for the accident. This is based on the necessary medical evidence to promote the mental and physical health of the plaintiff: *Pang v. Nowakowski*, 2021 BCCA 478 at para. 56. In *Gao*, the Court of Appeal summarized the applicable principles at paras. 68-70:

> [68] An award for damages for cost of future care is based on the principle of restitution. In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241-242, Dickson J., as he then was, explained the purpose of an award for cost of future care:
>
> > In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in a position where he would have been in had he not sustained the injury. Obviously a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, "*restitutio in integrum*" is not possible. Money is a barren substitute for health and personal happiness but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of the claim.
>
> [69] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 78,

> aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30. An award for future care must (1) have medical justification, and (2) be reasonable: *Milina* at 84; *Aberdeen* at para. 42.
>
> [70] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, this Court clarified that the medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability, and recommended treatment, and the health care professional's recommended care item (at para. 39).

[394] Assessing damages for cost of future care is not a precise accounting exercise. As noted in *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21:

> [21] Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

[395] Future care costs are a matter of prediction, requiring the court to determine the present value of future care needs of an injured party, while also considering contingencies to account for the fact the future may differ from evidence procured at trial: *Thind v. South Coast British Columbia Transportation Authority*, 2022 BCSC 197 at para. 76. The test is whether a "reasonably minded person of ample means would be ready to incur the expense": *Brennan v. Singh*, [1999] B.C.J. No. 520, 1999 CarswellBC 484 at para. 78 (S.C.); *Cheema v. Khan*, 2017 BCSC 974. The court must be satisfied that the care item is one that the plaintiff would, in fact, use; that it was made necessary as a result of the accident; and it is not a care item that the plaintiff would have procured in any event: *Williams v. Sekhon*, 2019 BCSC 1511 at paras. 171-172.

[396] In this case, the plaintiff's claims include specific items for the cost of obtaining assistance with housekeeping services. As summarized by Justice Basran in *Steinlauf v. Deol*, 2021 BCSC 1118 at para. 222:

- 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 his 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 homemaking capacity is provided by the work being performed by others, even if done gratuitously.

[397] Recent appellate authorities on this issue include *Liu v. Bains*, 2016 BCCA 374, where the court approved an award of $70,000, commenting at paras. 25-26:

> [25] … it has been well-established in this province that domestic services have value and an injured party may justifiably claim for loss of housekeeping capacity, even if these services are provided gratuitously by family members: *McTavish v. McGillivray*, 2000 BCCA 164 at para. 63.
>
> [26] It lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage. In *McTavish* at paras. 68-69, the Court suggested that treating loss of housekeeping capacity as non-pecuniary loss may be best suited to cases in which the plaintiff is still able to perform household tasks with difficulty or decides they need not be done, while remuneration in pecuniary terms is preferable where family members gratuitously perform the lost services, thereby avoiding necessary replacement costs.

[398] In *Riley v. Ritsco*, 2018 BCCA 366, the court reviewed the state of the law (at paras. 98-100) and commented at para. 101 that:

> [101] It is now well-established that where a plaintiff's injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non-pecuniary damages.

Expert Evidence – Cost of Future Care

[399] The plaintiff tendered a report dated July 10, 2022, titled "Cost of Future Care Planning Analysis", prepared by Mr. Bruce Hunt (who had earlier done a functional

capacity evaluation). To prepare this report, Mr. Hunt reviewed a variety of medical reports and records, conducted a telephone interview of Mr. Mantei on May 25, 2022, and also conducted a meeting with Mr. Mantei at his home on May 30, 2022. Mr. Hunt then prepared a list of recommended care items, and prepared cost estimates for each of those items.

[400] Ms. Clark, the economist who prepared the earnings estimates, also prepared a report dated July 18, 2022, that provided present value calculations for the various items identified by Mr. Hunt. Her calculations start from the trial date and continue through the life expectancy period of the average BC-resident male of Mr. Mantei's age.

Positions of the Parties

[401] The plaintiff submits that the court should award costs of future care in four main areas:

a) Adjunct therapies – including physiotherapy, massage therapy, kinesiology, and chiropractic, continuing on indefinitely with coordinated therapies he has been receiving at Intuitive Rehabilitation in Chilliwack, as well as:

   i. Nutritional counselling,

   ii. 14-16 sessions with a "backfitpro" therapist,

   iii. Ongoing Tai Chi,

   iv. A sacroiliac joint support belt (periodic replacement).

b) Counselling – ongoing two sessions per month with each of Jesbir Ram and Gemma Isaac;

c) Medication – Tylenol 3 and citalopram, which together cost approximately $225 per year;

d) Various home maintenance services, including bi-weekly house cleaning, seasonal deep cleaning, exterior window washing four times a year, exterior home washing twice a year, surface pressure washing twice a year, a car wash pass, and a one-time purchase of a snowblower.

[402] The present value of these costs is said to be:

a) Adjunct therapies:

i. Massage therapy (twice weekly) - $237,152;

ii. Physiotherapy (once weekly) - $114,844;

iii. Exercise therapy (weekly) - $105,512;

iv. Nutritional counselling - $1,214;

v. BackFitPro - $4,333;

vi. Tai Chi - $10,377;

vii. Sacroiliac belt - $3,005;

b) Counselling - $61,800 for Jesbir Ram and $75,366 for Gemma Isaac;

c) Medication - $4,504;

d) Home services:

i. House cleaning - $70,342;

ii. Seasonal cleaning - $17,585;

iii. Window cleaning - $20,761;

iv. Exterior home washing - $11,514;

v. Surface pressure washing - $16,393;

vi. Unlimited car wash pass - $13,176;

vii. Snow blower (one time) - $1,032.

[403] The defendant argued that the court should make a nominal award of $20,000 only. The defendant argued that, on its view of causation, the only needs truly arising from the MVA are for small amounts of massage therapy, plus perhaps some chiropractic and psychological counselling. It submits that the plaintiff had functional limitations even before the MVA, and thus must have been limited in some of his home care work even before that time.

Analysis

[404] In my view, it is appropriate to award amounts that would allow the plaintiff's ongoing treatments at Intuitive Rehabilitation to continue for some time. I would see an award for each treatment to occur twice per month to be reasonable in all of the circumstances and fair to both the plaintiff and defendant. That would amount to half of what is sought for each of physiotherapy and exercise therapy, and 25% of what is sought for massage therapy. By my calculation, that amounts to:

a) $59,288 for massage therapy,

b) $57,422 for physiotherapy;

c) $52,756 for exercise therapy.

[405] I would not make an award for nutritional counselling or Tai Chi. The nutritional counselling appears to be primarily targeted at diabetes, and there is insufficient evidence to connect that to the MVA. For Tai Chi, I see this and its related cost as a replacement for physical activities the plaintiff would have been doing absent the MVA.

[406] I would, however, award the other two items as sought: BackFitPro at $4,333 and Sacroiliac belt at $3,005.

[407] With respect to counselling, it is my view that monthly counselling sessions are appropriate for each of the two counsellors. By my calculation, that amounts to $68,583 based on the calculations in Ms. Clark's report. In my view, however, the need for counselling should reduce over time and I would award the sum of $50,000 under this head.

[408] I would award the $4,504 sought for medications.

[409] I accept that some home services are required. Mr. Mantei clearly had a significant role in doing work at his house prior to the MVA, and he gave evidence that he is now paying others to do this work. In my view, the amounts claimed and the frequency are more than is reasonable. The total claimed is just over $150,000. An award of 1/3 of this – just under $49,000 – would be reasonable in the circumstances.

[410] I would award a total of $280,000 for cost of future care.

Special Damages

[411] The parties have agreed to special damages in the amount of $49,599.45, subject only to the defendant's submission that there should be a general contingency deduction for all heads of damages. For the reasons set out above, I have decided that no such contingency deduction is appropriate.

Conclusion

[412] For the reasons set out above, I would award:

a) Non-pecuniary damages of $175,000;

b) Loss of earning capacity of $1,020,000;

c) Cost of future care of $280,000; and

d) Special damages of $49,599.45.

[413] The plaintiff is entitled to applicable court order interest.

[414] Should either party seek costs other than the usual order, they should provide their submission to me in writing through Supreme Court Scheduling within 30 days of the date of this judgment. The other party may reply within 30 days thereafter. I will advise whether I believe a hearing is necessary – although the parties are welcome to indicate in their submissions whether they believe a hearing would be appropriate. If neither party makes a submission with respect to costs, then the plaintiff will have his costs on Scale B.

[415] My award for loss of earning capacity is based on the calculations of Ms. Clark. I understand that those calculations include net amounts for past income loss and gross amounts for future income loss. If I am incorrect in my understanding, or it I have misapplied those calculation, or if the parties identify any mathematical errors, or if there is any issue that I have failed to deal with that was properly before me, then the parties may seek clarification of those matters, with the same schedule for submissions as in respect of costs.

"Veenstra J."