

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Timms v. Lucaben*,
2023 BCSC 1119

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Docket: M231389
Registry: New Westminster

Between:

Christopher Timms

Plaintiff

And:

Janet Lucaben

Defendant

Before: The Honourable Madam Justice Watchuk

Reasons for Judgment

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Place and Dates of Trial/Hearing:

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Table of Contents	Paragraph Range
I. INTRODUCTION	[1] - [7]
II. EVIDENCE	[8] - [127]
A. Overview	[8] - [16]
B. The Witnesses and Credibility	[17] - [22]
C. Evidence of the Plaintiff	[23] - [50]
D. The Lay Witnesses	[51] - [93]
1. Dave Kroeker	[51] - [59]
2. Caitlyn Kroeker	[60] - [63]
3. Jim Thompson	[64] - [67]
4. Tami Hagensen	[68] - [83]
5. Paul Millar	[84] - [88]
6. Magdalena Brown	[89] - [90]
7. Video Surveillance – By Admission	[91] - [93]
E. Expert Witnesses	[94] - [127]
1. Dr. Manu Mehdiratta – Neurologist	[94] - [108]
2. Dr. Dommann – Neurologist	[109] - [114]
3. Dr. Loch	[115] - [119]
4. Dominic Shew	[120] - [127]
III. FINDINGS OF FACT	[128] - [165]
A. Credibility of the Plaintiff	[128] - [133]
B. The Plaintiff's Injuries	[134] - [161]
1. Physical Injuries	[136] - [139]
2. The mTBI	[140] - [161]
C. Prognosis	[162] - [165]
IV. DAMAGES	[166] - [260]
A. Non-pecuniary Damages	[166] - [182]
B. Past Income Loss	[183] - [197]
C. Loss of Future Earning Capacity	[198] - [202]
D. Future Capacity Loss – Steps 1 and 2 – Potential Future Event and Real and Substantial Possibility	[203] - [215]
E. Loss of Capacity – Quantum Assessment and Relative Likelihood	[216] - [234]
F. Loss of Housekeeping Capacity	[235] - [242]
G. Future Cost of Care	[243] - [260]
V. CONCLUSION	[261] - [263]

I. INTRODUCTION

[1] This action arises from a motor vehicle collision (“MVC” or “collision”) on March 1, 2019. Liability is admitted by the defendant, Janet Lucaben, who drove her vehicle through a red light without stopping and collided with the vehicle driven by the plaintiff, Christopher Timms.

[2] The major issue, as is often the case, is a dispute over what the future holds and how to compensate Mr. Timms for his injuries and their effects. The defendant submits that, primarily because Mr. Timms is still working, there is no loss of capacity. The plaintiff says that that position is not supported by the law and the process mandated by recent cases in the Court of Appeal for the assessment of future claims – particularly claims for loss of future earning capacity.

[3] Both expert neurologists agree that Mr. Timms sustained a mild traumatic brain injury (“mTBI”), in the MVC. The dispute is whether an mTBI is a significant injury and the prognosis for recovery from the injury. There is also no dispute that Mr. Timms is experiencing chronic pain in his low back and neck. Although the exact reason for the pain is not known, the defence expert Dr. Lochter testified it is not possible to determine.

[4] The plaintiff submits that in order to assess his losses, the Court must look at Mr. Timms as he was the morning of March 1, 2019, when he got into his truck to go for coffee, and compare that to the person who appeared in court and who was described by his friends, his spouse, his former supervisor, and the expert witnesses.

[5] Before the collision Mr. Timms functioned well in his life. He experienced the typical ups and downs; he also sustained some significant injuries.

[6] The defendant submits that the primary symptoms experienced by Mr. Timms are attributable to other events in his life rather than to the MVC.

[7] The issues for the Court are the assessment of damages which are claimed by Mr. Timms: non pecuniary, past and future wage loss, loss of housekeeping capacity, and cost of future care. There is no issue regarding special damages.

II. EVIDENCE

A. Overview

[8] Mr. Timms is presently 50 years old, and was 47 at the time of the MVC. His employment as a lead hand detailer involves finishing carpentry and fixing whatever needs doing in a new home after construction and prior to owners taking possession. He takes great pride in the quality of his work, and is concerned that he cannot continue because of the symptoms he experiences since the MVC. The evidence indicates that he excelled at his job and was a sought-after detailer.

[9] Prior to the MVC, Mr. Timms led a full life with his work, and enjoyed many outdoor activities, including hiking, and dirt biking. He also enjoyed restoring cars and spending time with his spouse and close friends. A theme present in his work with vehicles – and apparent during his time spent with friends, was the ongoing debate of the superiority of Chevy vehicles over Fords. I will return to this theme.

[10] Mr. Timms is in a long-term relationship with Tami Hagensen. Together they enjoyed the outdoors and a close romantic bond.

[11] Mr. Timms had previously experienced serious injuries. He was in a car accident at age 15 or 16. He had a remarkable recovery following a dirt bike crash in his late 20s.

[12] The evidence indicates that he recovered from his 2018 knee surgery and returned to full function at work, at home, and at play following the surgery and the rehab.

[13] There is no evidence of any pre-existing condition or limitation causing him issues at the time of the MVC. There is no evidence of pre-existing depression, anxiety, or other mental health conditions. Nor is there evidence of any pre-existing cognitive deficits.

[14] The witnesses described Mr. Timms as tough, stubborn, and tenacious. Their evidence establishes that he has repeatedly shown his fortitude, grit and determination in recovery from difficult physical injuries.

[15] Mr. Timms' testimony described the profound effects of the symptoms he continues to experience since the MVC. These injuries and their symptoms have made it impossible for him to continue working much longer, as well as impossible to enjoy his life as he did prior to the collision.

[16] The evidence, set out in more detail below, also describes Mr. Timms as not being the same person he was before the MVC, and unlikely to ever be that person again. His mTBI, his chronic pain, and the effects these have had on him affected every aspect of his life – social, vocational, avocational, and interpersonal.

B. The Witnesses and Credibility

[17] The following witnesses testified on behalf of the plaintiff:

- Christopher Timms - Plaintiff
- Tami Hagensen - Spouse
- Dave Kroeker - Friend
- Caitlyn Kroeker – Friend
- Jim Thompson - Uncle
- Paul Millar – Supervisor
- Dr. Mehdiratta – Neurologist
- Dominic Shew – Functional Capacity

[18] On behalf of the defendant, the witnesses were:

- Dr. Dommann, Neurologist
- Dr. Loch, Orthopedic surgeon
- Magdelana Brown
- Video Surveillance by admission

[19] The defendant does not raise serious credibility issues with the plaintiff or any of the lay witnesses. It is acknowledged that each of those witnesses did their

utmost to be fair and helpful to the court and to provide truthful evidence. The plaintiff and his lay witnesses made concessions where appropriate. They did not dramatize events; indeed they rather understated the circumstances they described. Any inconsistencies between their testimonies are minor and immaterial, and are consistent with the human experience and the naturally differing interpretations of the same events by different people.

[20] Both parties raise some issues regarding one expert witness of the other party.

[21] The plaintiff submits that concerns raised in previous cases regarding Dr. Dommann's evidence are present in this case. In addition he says that there are grave concerns in respect to Dr. Dommann's lack of care and attention in formulating the report, as well as his procedures when writing reports for the court.

[22] The defendant submits that Dr. Mehdiratta was at times an advocate for the plaintiff.

C. Evidence of the Plaintiff

[23] Mr. Timms testified extensively regarding his pre and post MVC circumstances, including his physical condition, his work, activities with his friends and spouse, as well as his medical history.

[24] Born in Burnaby and having lived in the Lower Mainland his whole life, Mr. Timms quit school in Grade 8 and finished Grade 10 at night school. He was young when he started working, first as a painter and then in construction doing everything including carpentry, drywall and framing.

[25] Presently Mr. Timms works as a lead hand detailer which is a type of work that occurs at the end of construction of new homes and involves fixing whatever needs doing including finishing carpentry, flooring, painting and generally remedying deficiencies arising from areas that are unfinished or damaged. As a lead hand he also organises the crew and assigns their tasks. On one site there were 19 crew

members. He describes his job as requiring that the work be completed on time and properly. At work, Mr. Timms was known as a creative problem solver.

[26] For 17 years his employer was Arkay Contracting Ltd., and he now works for Quolus Construction. Mr. Paul Millar is a site superintendent who he has worked with, although not as a direct employee as Mr. Timms' employer is hired by construction companies such as Polygon.

[27] Mr. Timms' hobby has always been cars as he has been working on cars all his life since starting at age 5 with his dad. He has done interiors, mechanical work and full restorations. As his talents progressed over the years he was able to make some profit restoring and reselling cars. In the Chevy versus Ford debates with his friends, he was always an avid and amiable Chevy supporter.

[28] The other hobby is dirt biking which used to be his favourite thing in the world. At age 8 he started with his first dirt bike and he has pretty much always had one since. He has done big jumps and moto-cross, as well as all-day exploring trips of 8 to nine hours. Jim Thompson, Dave Kroeker and other buddies would go out with him one or both days every weekend to explore and see what they could find. Mr. Timms' sense of direction was very good. He knew his way around, and would not get lost as they travelled in the wilderness areas.

[29] Mr. Timms has previously suffered a number of serious injuries. When he was about 15 or 16 years old he was involved in a car crash. He lost a kidney as a result, broke his arm, and sustained a low back injury that resulted in back pain for a year.

[30] In about 1999 (at around age 27) he was involved in a dirt bike accident while out with a friend who died in the accident. Mr. Timms punctured his liver, spleen and gall bladder, and had pins and screws put in his broken hip as well as a steel bar in his broken leg. He was left with a broken pelvis and collar bone from which he recovered. He was in the hospital for about six months, and then left on his own in a wheelchair as he could not take the hospital anymore. He did rehab on his own, and after a year went back to work although a doctor had told him he would not work

again. He returned to dirt biking as soon as he could, and was back on a bike two years after the crash. His hip, pelvis and back had fully recovered and were fine before the MVC. He also broke his collar bone again and it too has healed.

[31] After injuring his left knee at work in 2018, and while awaiting surgery, he did not miss work although he was in constant pain and had to drag his body around. The left knee surgery occurred about six months before the collision, and with rehab, the knee gradually improved until there is now no pain whatsoever. If there is any aggravation, it goes away in no time. He more recently injured one elbow moving a door at work, and then injured the other elbow.

[32] Mr. Timms met Tami Hagensen six years ago, and they have been living together in different rented houses for the past five years. She was his dream girl. He and Tami would often go on long walks or hiking with their dog. After his dog Otis died, they got a new dog, Zeus. They went dirt biking together and with friends. They often enjoyed going out for dinner or to the movies, and they had sexual intercourse almost nightly.

[33] Prior to the collision, Mr. Timms completed many domestic chores and projects. He cooked, did yard work, and maintenance and improvement tasks around their houses to make them nicer.

[34] The MVC occurred when he was driving from a work site to get coffee. His vehicle was hit in an intersection when the defendant drove through a red light. After the collision he was not able to see for 5 to 10 seconds – everything was black although he could hear. He had pain in his shoulder, and chest pain from the seatbelt. His knee hurt. The fire department attended, and he parked his truck and got a ride from his friend Dave Kroeker. Later that day he went to Emergency, and went back the next day because he was in a lot of pain.

[35] Mr. Timms' present physical symptoms include back pain, neck pain, nausea and headaches. He has mild or dull headaches every day, a three out of ten, and about five times per month they are medium all day. About 3 to 4 times a year the headaches are so bad that he throws up violently. He tries not to take anything for

the pain except extra-strength Tylenol every hour which does not get rid of the pain but provides the “tiniest bit of relief [which] is heaven.” Before the crash he had some headaches but not that often.

[36] Mr. Timms has low right back pain, and cannot sit for more than 30 minutes to an hour. It feels like broken glass poking out of the skin. His neck pain is fine if he is not turning his head, but goes down the back and front of his neck when he turns. His shoulder is fine now, and has been for about a year.

[37] Sleep has been affected. Now he tosses and turns all night every night. He sleeps when he gets home from work exhausted. Fatigue is a major issue. Mr. Timms says that it seems to take all his energy to move his body around, and even walking feels like dragging his body around.

[38] Balance is now terrible, although it has become a bit better with exercises. Mr. Timms has to look straight down, and often falls backwards when he looks up. When he is painting walls, he has to catch himself before falling over. He does not go up ladders anymore because he feels like he will fall although he has been on ladders all his life. He feels like he will fall off balconies and roofs. He veers when he walks unless he keeps his eyes focused on the ground in front of him.

[39] Memory is also now terrible as he forgets much. As he cannot remember, he puts sticky notes all over his truck and on his phone. He once forgot to put the top on the brake fluid which is something that before the crash, he never would forget. He never had to “bag and tag” when he was working on cars as he could rely on memory as to which bolt was from which part and could easily put a transmission back together with all the bolts in the right places. Now when he does work on cars he relies on bagging and tagging. Restoring cars is not as much fun now and with his back pain and headaches, he is not able to spend much time in the garage where he previously went to relax.

[40] Mr. Timms’ sense of direction is also terrible. He got lost going home from physio recently even though he knows all the streets. It never happened to him before the collision and causes him to panic and become angry and frustrated and

scream at himself at the top of his lungs in his truck. He calls himself a “fucking retard”.

[41] Prior to the collision he was not quick to anger. Now he is angry all the time, yells a lot, gets frustrated at himself and takes it out on Tami. He described the Costco incident as an example of this. His relationship with Tami is not good right now: they hardly talk and she frustrates him. Sex for the couple is now non-existent, either because of back pain, his headaches or because he is “such a jerk” to Tami. They no longer go dirt biking or hiking.

[42] Mr. Timms would now also get lost dirt biking in the wilderness. But he cannot dirt bike for long periods, and sometimes goes out only for 30 to 45 minutes. He no longer cleans, does yard work or house maintenance. He and Tami do not go out as much: he is more of a hermit, sitting on the couch and preferring to watch YouTube rather than television because the videos are short.

[43] Mr. Timms attends iScope for concussion therapy. Lights now bother him more than they used to. He has been attending physiotherapy regularly for two and a half years at two different clinics for therapies for his back and concussion symptoms. He exercises daily as prescribed and does not stop when he gets nauseous. He has been in counselling for a few months one time per week for the first time in his life. He is willing to try anything.

[44] Mr. Timms has not relied on medications as his experience is that they do not work for him. He tried pills for his Lupus for three months but it resulted in a trip to Emergency with severe stomach pain. Diet and exercise work better for him in controlling his lupus which now gives him no issues. When the pain from his collision injuries is super bad he will take pills, but he tries not to instead relying on Tylenol for headaches. The pills he tried for depression made it worse and made him think of suicide more.

[45] Mr. Timms has not had any significant periods of time off work pre or post collision. He took eight days off work for an injury to his elbow in March 2021 from moving doors. He had a knee injury at work pre-collision, but no time from work

before the surgery which was about six months before the collision notwithstanding the pain. After the collision he missed a couple of weeks of work and took Fridays for recovery time. From his timesheets, he recalled that not every day off was due to the collision but he did not know exactly how many days were because of the collision. He also previously worked overtime almost every week.

[46] A short time after the accident Mr. Timms declared personal bankruptcy as a result of owing income tax to the CRA when his work status changed from being an employee. The duties did not change, and he returned to being an employee

[47] With regard to his future at work, although he would have been able to do the Quality Supervisor position, he know that he cannot do it now. He does not have the organizational skills for scheduling and paperwork, nor would he be able to sit at a desk for it because of back pain. He tried the job for two weeks after the collision, but it turned into a fiasco because he forgot to have some things done, such as forgetting to rekey one of the doors. He says that he will keep doing what he is doing until he cannot.

[48] While pre-collision Mr. Timms could lift objects over 80 pounds, he can no longer lift anything more than 20 pounds, nor can he lift repetitively. His work reputation used to be very good and people would request him by name. It is still pretty good but it has gone downhill. People are starting to figure out that he cannot do the work that he previously did and he was recently fired from a job which is the first time in 17 years that that has happened. The bosses in his company have no loyalty to their employees and can get rid of him anytime.

[49] Mr. Timms also had a tragedy recently with his younger sister dying of lung cancer. They had been very close growing up though she was 14 years younger. When she was ill she would call Mr. Timms frequently, but he started to not take her calls as it broke his heart to see her that ill. Ms. Hagensen also described how difficult it was when Mr. Timms would no longer speak with his sister after the collision.

[50] Mr. Timms now is more anxious when he drives. He says that he does not feel super depressed, but he does not see a future. He no longer has any hope that he will be able to live his dream of building a cabin in the woods. He has thought about taking himself out of things. He has no plans for retirement because he does not make enough money. His plan was to basically die with his tools in his hand – before the collision he was hoping to work forever.

D. The Lay Witnesses

1. Dave Kroeker

[51] Mr. Timms, who was a good friend of Mr. Kroeker's father, is Dave Kroeker's best friend. They have been close ever since Mr. Kroeker's father passed away, having bonded over their shared love of cars and would often work on cars for hours. They had healthy debates over the Ford versus Chevy rivalry as Mr. Kroeker's father was a Ford guy.

[52] Prior to the collision, he described Mr. Timms' strength, telling of one instance when replacing the transmission on his truck, Mr. Timms was able to manually hoist it. He also described Mr. Timms' loyalty as he was the only friend who helped him when he moved to Chilliwack. Mr. Kroeker said that Mr. Timms was the toughest person he ever met, and was always the first guy to jump in, and would never complain about anything, even after the bad dirt bike accident. He described Mr. Timms as the Six Million Dollar Man put back together.

[53] They also went dirt biking together, every weekend in the summer and even in the snow. Their trips were extreme involving trail riding and trail blazing. Mr. Timms was always the navigator as even in a new place in the woods he could always find their way out.

[54] Prior to the collision, Mr. Timms was detail-oriented and had an excellent memory. For example, Mr. Timms could go into a pile of garbage and pull out exactly the right bolt or part. He would not need to "bag and tag" when working on a car because just knew where everything went and in what order.

[55] When the MVC occurred, Mr. Kroeker went to the scene to assist Mr. Timms. He described Mr. Timms as being a little “squirrely”, and worried about his truck.

[56] After the MVC, they went dirt biking together once or twice, but it did not last long. They went out onto the flats, which took about 15 to 20 minutes to get up there but Mr. Timms had a bad headache and said he had to go. They have not gone out together since.

[57] Before the MVC they were together every weekend always doing something. Mr. Timms came to Chilliwack to visit them but he has not visited there in about six months since the long drive is now too much for him. The last time was when he got a new puppy. When they do see each other, they barely work on cars as Mr. Timms quickly loses his motivation.

[58] Their conversations about Fords and Chevys have continued but Mr. Timms is prone to get over-excited and angry. It is now a bit of a screaming match with the volume at an 11, rather than the previous cool 4 to 5.

[59] Mr. Timms is not as quick-witted as he used to be. For example he now needs to bag and tag when working on cars, and puts lists of steps of a project on the window of the car. His memory issues are evident, and he relies heavily on google for things he should know. There was an instance when tuning the carburetor on Uncle Jim’s truck – which can be done by “sound” and used to be one of his specialities – he could not get it running properly and had to do it with a vacuum gauge the new way. Mr. Kroeker also described an instance where Mr. Timms caused a fire when welding, which was a “rookie mistake” and out of character for Mr. Timms.

2. Caitlyn Kroeker

[60] Caitlyn Kroeker is Mr. Kroeker’s spouse. She has known Mr. Timms for 15 years. Prior to the MVC, she recalls Mr. Timms and her husband spending long hours in the garage working on cars. She noted Mr. Timms’ good memory and that he and her husband would have friendly arguments about trucks and other subjects.

[61] It is rare even to see him now; she thinks he used to visit almost weekly. Mr. Timms does not work on cars with her husband much anymore. She testified about his memory issues. On one occasion he called to ask about a truck he had given her as he could not remember what work he had previously done on it. This was unusual for him.

[62] Ms. Kroeker also noted a change in Mr. Timms' demeanour. He is now often angry, and the previously playful arguments about Fords vs. Chevys are now heated and angry on Mr. Timms' part.

[63] Before the MVC Ms. Kroeker would have described Mr. Timms as optimistic, outgoing and funny. After the collision he is crabby and short-tempered.

3. Jim Thompson

[64] Jim Thompson is Mr. Timms' uncle and friend. Mr. Timms came to work with him in Edmonton when he was a teenager, and he wanted to do the same work that the other guys were doing. The last job they worked together was at the Kingsley Estates. Mr. Thompson described how stressful he found the job, and how he could not keep up with Mr. Timms.

[65] Before the MVC they went hiking together, usually in rugged terrain, and dirt-biking. When biking, they would venture off the trails into the wilds. He recalls once going dirt-biking with Mr. Timms when he broke his collar bone and Mr. Timms still drove them out of the bush. When Mr. Timms was in the crash as a teenager, Mr. Thompson lived nearby and described the concern that Mr. Timms may not survive, but he was always mind over matter. Though there was also some concern that he would ever walk again, he persevered.

[66] Mr. Thompson is also a Chevy guy and often worked on cars with Mr. Timms. After the MVC he has noticed in the garage that Mr. Timms' loses his balance and stumbles. Since the MVC they have not gone dirt biking or hiking.

[67] Before the collision Mr. Thompson would have described Mr. Timms as self-confident, dedicated and stubborn, and reliable and trustworthy. Now he is not self-confident but he is still stubborn and reliable.

4. Tami Hagensen

[68] Tami Hagensen has been in a relationship with Mr. Timms since 2016, and they live together in a rental house in Surrey. She described him as tenacious – anything he attempted to do or intended on doing he was “all-in”.

[69] In their years together prior to the MVC they enjoyed an active lifestyle together. They frequently went for long three to four hour rugged hikes like mountain climbing, and he went dirt biking frequently. He had no limitations around the home, and though he could perform all domestic tasks, he typically did more outside work while she did the inside work. He would also spend hours in the garage, sometimes until very late at night, and he was a good “oven-cooker”.

[70] Ms. Hagensen testified to his character; he was not the type to let a small injury put him down. For instance, she remembers that when he hurt his knee, he kept going into work before finally realizing he needed surgery. In recovery he pushed to get better and normal. Prior to the MVC he did experience some small tweaks, aches, and pains, but he just persevered and pushed through it all. He was not a complainer.

[71] Prior to the MVC, Mr. Timms had a good memory. Though he may have misplaced things here and there, it was normal and would not lead to a meltdown as it does now. He did not need lists or post-it notes as memory aids.

[72] When they first moved in together in 2017 Mr. Timms was kind, empathetic, very generous and absolutely tenacious. He was quick witted and a good conversationalist. He was active and did not watch a lot of TV. He had a big love for animals and nature and was a hard-working man.

[73] In the last few years there has definitely been a big change in Mr. Timms. He is different in so many ways. It is not just the lack of kindness but in general. She

said that she does not know if there is a word that encompasses that so much is different now than when they met. He is not generous anymore, and not empathetic. Rather than tenacity he just doesn't have much in him anymore. Though he tries, he very rarely completes and just gives up, pretty much with everything. He is frustrated all the time.

[74] Driving with Mr. Timms the last three years has involved quite regular misdirections. When they are driving he forgets where they are going, then gets into a rage with yelling and screaming. Even driving to a breakfast place they have gone every weekend often results in him going in the wrong direction and then calling himself a "stupid fucking idiot". On a Costco trip they left in a great mood but when they arrived at the Costco parking lot which was full, Mr. Timms absolutely lost it and screamed at Ms. Hagensen calling her names.

[75] Ms. Hagensen testified that now Mr. Timms is often exhausted. He sleeps when he gets home from work. He is unable to complete tasks and has failed to do the work promised to the landlord in exchange for lower rent. He is capable of basically doing one thing in a day. There are tasks left undone – such as the storage tent, pressure washing, and framing around the front door. He does not help with any housework anymore either inside or outside. Now everything is on her shoulders including the cooking, garbage, lawn and garden.

[76] After the knee surgery and rehab, Mr. Timms was fairly positive. He never was a negative person, and didn't say a lot about himself. His approach to things was that "he had to do what he had to do". In contrast, after the collision, he went from not saying anything to regularly complaining. After the knee rehab he persevered but now he seems like a deflated man.

[77] The headaches now occur all day from when he wakes up to when he goes to bed. About once every three to four months there are violent headaches where he cannot see and is writhing in pain barely able to move, let alone breathe. With these headaches which last for a couple of days, not just a few hours, he throws up violently.

[78] Before the collision his memory was good and he was quick-witted and clever and quite the conversationalist. At times he would forget things, but not for extended periods. He would be able to recall. Now he just gets angry and has meltdowns at times when he frequently misplaces his keys, phone and dog leash during their morning routines.

[79] As Mr. Timms is forgetful, he uses post-it notes on his speedometer. He writes lists for basic things. He has become unsure of himself and his abilities and is constantly checking google for things he should know.

[80] They do not hike or walk together, nor does Mr. Timms go dirt biking. He has terrible sleeps and tosses and turns so much every night that she often sleeps on the couch. Sex is now very infrequent and there have been at least two instances of sexual aggression in the last year or so which had never previously happened.

[81] Ms. Hagensen describes Mr. Timms as very angry and depressed. She did not see signs of depression before the MVC. He now spends long periods of time in the dark, in bed, watching TV or YouTube on his phone. He is now messy whereas previously he was always very tidy. He repeats himself and tells her about the same show from YouTube multiple days in a row. She described it as like he is stuck in a loop with the same thing over and over again. He has also become quite repetitive in telling her the same things more than once.

[82] She is also worried about his other abilities being affected because, for example, it took him weeks to figure out a residential tenancy form which was eight or ten pages. He kept going over it and over and complaining that it made no sense.

[83] Ms. Hagensen has thought seriously about leaving Mr. Timms, but she loves him and thinks she can still help him. The worst thing to happen to him because of the collision is not the aches and pains, but that he cannot recall the simplest things. He tries and continues to try but he cannot find a solution. It is so hard for him not to be able to remember or recall.

5. Paul Millar

[84] Paul Millar is a superintendent at Trillium Projects. He has worked with Mr. Timms as a detailer and as a lead hand. He testified about how he was impressed with Mr. Timms' work abilities and would specifically request Mr. Timms for his jobs. Mr. Timms was organized, able to run a crew of up to 18 people, and did the work of two guys. Mr. Timms' work was excellent and while typical detailers would have five to 15 deficiencies, Mr. Timms only ever seemed to have two or three.

[85] Mr. Timms was reliable and Mr. Millar trusted what he could do, so much so that, Mr. Timms became his lead hand – meaning he was the go-between for Mr. Millar (as the site super) and the other detailers. Mr. Timms wanted to do a good job, and was always one of the last detailers on site. His abilities were endless. He could do outside work, and there were no problems with climbing ladders, painting or flooring. He had no issues with Mr. Timms, and he always knew the job would get done. Detailing work required a lot of sequencing to get things right and Mr. Timms almost always got it right.

[86] After the crash, Mr. Millar started to notice a decline in Mr. Timms' work quality. He testified that it was not noticeable at first, but as his units started coming up for review, problems became apparent. Further, Mr. Timms did not used to miss work, but after the crash he started calling in more. Mr. Timms now had issues with memory and frustration. After the crash Mr. Timms had to write every single little thing down or he would forget. This became problematic for Paul because he had deadlines.

[87] Mr. Millar never used to have to look at Mr. Timms' unit before inspection, but Mr. Timms was no longer as fast as two workers. In September 2021, he had to give Mr. Timms more time and space to finish his job, though at this point he still trusted him to do it correctly. He let him coast to the end of the Hadleigh project because felt he owed it to him and felt like that was giving him a second chance.

[88] Reputation is important in the industry and if Mr. Timms does a good job, Mr. Millar does a good job. He would want to ask for him, but if the same guy from the end of Hadleigh showed up would have to fire him. Mr. Millar described the employment relationship between the labour companies and the site contractors. It is not an employment relationship and no duties are owed to the detailer. He would not recommend him anymore. Mr. Millar does not think Mr. Timms in his current state could be a QS or an assistant site super, although his pre-MVC self could. A QS who struggles with simple math, as Mr. Timms now does, could not do the job.

6. Magdalena Brown

[89] Magdalena Brown appeared as a witness for the defendant. She was employed as a kinesiologist to complete Ability to Function assessments, in this case for WorkSafe. As a result of her assessment, Mr. Timms was found to be partially permanently disabled from his knee injury.

[90] Ms. Brown gave evidence as to the plaintiff's reported level of functional impairment as of November 6, 2018. She first asked questions of Mr. Timms, then recorded her interpretation of those responses, and finally prepared a chart in which she paraphrased her recording of Mr. Timms' responses. Ms. Brown has no specific recollection of the assessment of Mr. Timms and no memory of his actual responses. The interviews usually take ten to fifteen minutes.

7. Video Surveillance – By Admission

[91] The defendant submitted video surveillance of the plaintiff in the parking lot of a mall, and walking in the aisle of a store, each segment at most of two minutes duration.

[92] Mr. Timms is shown standing on the front bumper of his truck in the parking lot. He testified that he was changing an air filter, which weighs about two pounds, which is why the hood was open. The entire process took two minutes approximately. He also testified that his body position for this purpose was different from that when he would be doing big jobs in a garage.

[93] The video also shows Mr. Timms in an aisle of the store. He testified that he was likely looking for Tami at the time which is why his head was turned.

E. Expert Witnesses

1. Dr. Manu Mehdiratta – Neurologist

[94] Dr. Manu Mehdiratta, a neurologist specializing in stroke and brain injury, testified as an expert witness on behalf of Mr. Timms. He examined and assessed Mr. Timms by video-conferencing on February 6, 2021 during the pandemic, and his report dated September 9, 2021, was entered as an exhibit (“Mehdiratta Report”).

[95] The Mehdiratta Report outlined Mr. Timms’ pre-collision medical, social and occupational history. Dr. Mehdiratta noted that Mr. Timms reported having fully recovered from his injuries from previous accidents, and that previous concussions did not limit his life as he was fully able to return to all activities. Dr. Mehdiratta concluded that Mr. Timms’ history is consistent with recovery from those previous injuries. However, a history of previous concussions does make it harder to recover which may explain why he has had a poor recovery from this accident.

[96] It is noted that prior to the MVC, Mr. Timms was employed full-time in general construction. He could complete housekeeping and home maintenance tasks as needed, such as dusting, sweeping, mopping, vacuuming, dishes, ironing, laundry, washing windows, cleaning the bathroom, tidying, gardening, repairs in the home, painting, replacing light bulbs and other tasks. He participated in recreational activities, which included restoring vehicles and biking.

[97] Post collision, Mr. Timms reported being able to return to work with modified duties due to his limitations, which included becoming easily confused and lost, as well as being unable to complete tasks involving heavy lifting. He has not been able to return to housekeeping and home maintenance tasks due to back pain. He has not returned to his social and recreational activities due to his ongoing symptoms.

[98] The symptoms currently experienced by Mr. Timms were listed as: headaches which are constant which can increase to severe at times; neck pain

which is constant and worse on the left side, as well as occasional numbness from the elbows to the hands; low back pain which is worse on the right side with numbness and tingling into the legs; and cognitive symptoms including a decreased memory, poor sense of direction, poor reading retention, and difficulty with concentration and focus.

[99] Other symptoms are intermittent dizziness, which results in him losing his balance and feeling like he is not walking straight. He often veers to the left and his left leg will feel weak. He experiences poor sleep and has difficulty staying asleep. He has had significant changes in his mood: he is now very irritable, easy to anger and prone to rage outbursts. His vision is blurred intermittently.

[100] At the time of the examination by Dr. Mehdiratta, Mr. Timms' only medication was acetaminophen with codeine. He had previously attended physiotherapy and after the examination he commenced, and has continued to attend, counselling.

[101] Dr. Mehdiratta noted in his testimony that Mr. Timms did lose consciousness in the collision. In making his clinical diagnosis Dr. Mehdiratta stated: "...it is my opinion that he sustained a mild traumatic brain injury (mTBI) and cerebral concussion as a result of the subject accident." He further stated: "Following the accident, Mr. Timms began to experience a constellation of symptoms classic for post-concussion syndrome (PCS)."

[102] Dr. Mehdiratta explained that a concussion is also known as a mild traumatic brain injury. "Mild" refers to the fact that there is no bleeding in the brain. The damage is to the body of the brain, to the billions of neurons which make up the brain. Further, with regard to the diagnosis of mTBI generally, Dr. Mehdiratta stated that it has become apparent that it is not a "mild" process in a large proportion of patients, and this has led to a significant amount of new research into the diagnosis, natural history and treatment of concussion/mTBI. Concussion is now known to affect the physical, cognitive, sleep and emotional domains of a person's well-being and subsequent function. A whole host of injuries occur, then followed by secondary injury.

[103] The specific neurological diagnosis as a result of the March 1, 2019 motor vehicle collision was listed as:

- Traumatic Brain Injury (TBI)
- Post-Concussion Syndrome
- Chronic Migraines
- Post-Traumatic Vestibulopathy
- Post-Traumatic Vision Syndrome

[104] The Mehdiratta Report states that Mr. Timms' persistent difficulties, from a neurological perspective, impact his capacities particularly as they relate to his role working in general construction. Further:

The job demands of this role involve a variety of cognitive and physical demands that I believe are outside of Mr. Timms' overall capacity at this time given his difficulties from a neurological perspective. Although he has returned to modified employment, he continues to experience ongoing difficulties due to his physical and cognitive limitations. As a result, I do not believe that he is competitively employable in his pre-collision role given his current presentation as a direct result of the injuries sustained in the indexed collision. I would expect that he would have impaired function in the labour force due to the ongoing impairments, which are more likely than not to impact his future roles given his age and job experience of approximately 30 years in the industry.

[105] Dr. Mehdiratta opines that Mr. Timms is at a loss of competitive advantage in the work force, and over the long-term he is likely to have increasing difficulty at work which is going to impact his income and ability to progress in his career.

[106] Further, Dr. Mehdiratta considers Mr. Timms to be at least partially disabled, particularly as it relates to housekeeping and home maintenance tasks as a direct result of the neurological injuries sustained in the collision. From his recreational and social activities, he is partially disabled as a direct result of the injuries sustained.

[107] With respect to causation, it is his opinion that Mr. Timms' collision-related impairments are directly related to the collision. Dr. Mehdiratta states that Mr. Timms' symptoms are due to the head trauma from the collision.

[108] The prognosis is poor given the severity and duration of symptoms. Patients, such as Mr. Timms, who have symptoms for more than 1.5 years are more likely than not to have permanent post-concussion symptoms involving physical, cognitive, sleep and emotional aspects after mild traumatic brain injury. He should be monitored as he ages for worsening memory, especially given the fact that he has been getting lost easily, which can be a red flag for dementia. Patients with concussions have a higher risk of dementia, and given Mr. Timms' ongoing symptoms there is a higher likelihood of this as well.

2. Dr. Dommann – Neurologist

[109] Dr. Dommann, a neurologist specializing in migraine headaches, testified as an expert witness on behalf of the defendant regarding his report dated August 16, 2022 (the "Dommann Report") and his neurological examination of the plaintiff.

[110] The Dommann Report contains a brief summary of Mr. Timms' pre-collision history, including his work and recreational activities. It outlines that Mr. Timms used to enjoy dirt biking, playing hockey and playing football. The dirt biking is now limited by back pain and a concern that he may get lost in the mountains due to his cognitive symptoms.

[111] Mr. Timms described his symptoms post-collision as a chronic daily headache, which he grades as a three out of ten, and more severe headaches a couple times per year. As he does not like taking pharmaceuticals, the headaches are not treated with painkillers. He has decreased range of movement in his neck with tingling in arms. He has lower back pain, which Dr. Dommann stated was most likely mechanical and also due to lumbosacral spondylosis, which is a degenerative condition.

[112] In discussing his cognitive symptoms, Mr. Timms reported that his memory has been affected and needs to keep taking notes as reminders. He has trouble with his sense of direction and feels slightly off balance which makes it difficult of him to work at heights.

[113] Dr. Dommann opined that it is more likely than not that the forces involved in this motor vehicle collision were enough to result in a mild traumatic brain injury. He stated that usually the symptoms of this resolved within a matter of months although in some cases headaches can persist due to the triggering of a migraine headache disorder, or cervicogenic headaches secondary to cervical spondylosis.

[114] It was Dr. Dommann's opinion that it is unlikely that this vehicle collision has resulted in any significant cognitive injury. He suggested a psychiatric assessment to evaluate him and discuss a possible mood disorder.

3. Dr. Locht

[115] Dr. Locht testified as an expert orthopaedic surgeon on behalf of the defendant. He assessed Mr. Timms, and testified regarding his report dated August 19, 2022.

[116] Dr. Locht noted that after his knee surgery, prior to the collision, Mr. Timms returned to work in October or November 2018 with no physical limitations. There were no pre-existing limitations for any household activities or recreational activities after recovery from his knee injury.

[117] Post-collision, Mr. Timms had left shoulder pain. There was sore spot on the left side of head, and increasing neck stiffness and there remains persistent low back pain. He did not return to fixing up and the restoration of cars. He does not lift more than 10 to 15 pounds. He avoids heights because of balance problems. He does participate in some light cooking, and surface cleaning while avoiding vacuuming. He has not returned to dirt biking as a low back pain avoidance strategy. Mr. Timms also does not dirt bike because of concern that his memory and cognitive difficulties would be a risk for getting lost in the wilderness roads.

[118] In his report Dr. Locht noted that Mr. Timms reports almost constant right-sided paralumbar/low back pain from just above the right sacroiliac area up to the upper lumbar region.

[119] Dr. Locht was of the opinion that Mr. Timms sustained nonspecific soft tissue injuries of the lower back/lumbar spine in the collision. He stated that the majority of Mr. Timms' low back pain is likely arising from ongoing nonspecific tissue pathology as a result of the subject accident. However, in the absence of the collision, the plaintiff would be experiencing at least nondisabling and intermittent nociceptive low back pain. Further, he opines that it is reasonable that Mr. Timms would have had the physical abilities to return to dirt biking at the nine-month mark after the collision.

4. Dominic Shew

[120] Mr. Shew is an occupational therapist and authored a report titled: Cognitive Functional/Work Capacity Evaluation, Functional/Work Capacity Evaluation and Cost of Future Care/Cost Analysis Report ("the Shew Report") dated August 29, 2022. He testified as an expert witness on behalf of the plaintiff. For the facts, assumptions and opinions in his report, Mr. Shew relied on Dr. Mehdiratta's diagnosis of Mr. Timms.

[121] Mr. Shew stated that prior to the MVC in 2019, Mr. Timms reported that he did not have any symptoms or limitations to participating in his vocational or chosen avocational activities. He and his girlfriend Tami equally shared the general house cleaning tasks; Mr. Timms completed tasks such as pressure washing the exterior of the house, and walkways once yearly over two weekend days, and cleaning of the gutters (once yearly, for 30 minutes). He was physically unlimited with minor repair tasks and physically unlimited with yard work. He enjoyed an active lifestyle, which included dirt biking, hiking and fishing. He also enjoyed working on vehicles, including exterior body work and engine work. He was fully independent, and physically unrestricted in respect to transportation and BADLs ("basic activities of daily life").

[122] Now, Tami now completes 100% of the cleaning tasks, gardening and yard work. Gardening and yard work is "a killer" on his back and neck and the heat in the summer brings on a bad headache. He cannot dirt bike any longer as it results in too much pain in his back and neck and headaches. There is aggravation of his symptoms when working on vehicles as the bending forward will aggravate his lower

back and the pressure in his head. He is too exhausted after work to do any housework and has no energy. He has not tried to clean the gutters as his balance is bad. Mr. Timms reported that he did not have any difficulties with his sleep before the MVC in 2019. Now, he wakes frequently due to pain in his neck.

[123] Mr. Shew concluded that the physical activities of the plaintiff's position as a lead hand were likely a combination of the duties of a Construction Trades Helper and/or Labourer, and a Finishing Carpenter pursuant to the NOC and DOT descriptions of those vocations. He had the capacity and strength to handle loads up to 50 pounds from ground to shoulder height and 70 pounds occasionally from ground to knuckle height. He would thus have the capability to perform aspects of those NOC and DOT described occupations, but should avoid loads at the upper limits and obtain assistance with loads over those limits.

[124] With regard to body positional demands, although he demonstrated the ability to manage short periods of activity, there were objective limitations in his ability to tolerate tasks that applied stress to his neck and lower back. Mr. Shew opined that the ability to perform and tolerate tasks involving one's neck and spine are critical requirements of such laborious occupations.

[125] Further, Mr. Timms demonstrated considerable cognitive limitations. The cognitive demands of his occupation require the abilities of, for example, deductive reasoning, information ordering, and selection attention.

[126] Overall findings indicated that it is unlikely that Mr. Timms will be competitively employable on a part and/or full time, durable basis at such an occupation in an unlimited manner due to his functional limitations in terms of strength, his ability to sustain tasks that apply stress to his neck and spine, and his cognitive limitations. He is capable of performing intermittent periods of activity but will require significant accommodations in order to remain safe and functional.

[127] Mr. Shew concluded that given his physical, functional, and cognitive limitations and the accommodations required for him to remain employed (including the need for breaks, the need for assistance, the flexibility to alter his schedule, the

acceptance of a reduced level of productivity), Mr. Timms is likely at a considerable, competitive disadvantage compared to his cohorts who do not have his same physical, functional, and cognitive limitations.

III. FINDINGS OF FACT

A. Credibility of the Plaintiff

[128] In assessing the evidence and making findings of fact, a key finding is with regard to the credibility of the plaintiff. I find Mr. Timms to be entirely credible and reliable. Having outlined the evidence in more detail, it is important to note both the consistency of Mr. Timms post-MVC complaints and his reporting to multiple professionals, including the experts retained by the defence. As in many personal injury cases, the primary source of information about the injuries is the plaintiff himself. In his testimony I found Mr. Timms to be keenly honest and calm and understated without any drama or exaggeration. In cross-examination his demeanour remained amenable and humble. He readily admitted facts not to his benefit.

[129] I therefore attribute a high degree of weight to the plaintiff's evidence. It is supported and further described Dr. Mehdiratta, Mr. Shew, and the lay witnesses.

[130] The defendant did not challenge Mr. Timms with any medical records, and Dr. Dommann and Dr. Lochter did not refer to any inconsistent medical record in their reports.

[131] Although the defendant submitted that he was not challenging the credibility of the plaintiff as a whole, he suggested that Mr. Timms was over-reporting his symptoms. This refers to the assessment from WorkSafe which was conducted by Ms. Brown regarding the disability award. Given the discrepancies between her recording of the answers to the questions posed to Mr. Timms and the narrative chart, I attribute no significance to any discrepancies. The process engaged in by Ms. Brown fulfilled its stated purpose; its attempted use in impeaching Mr. Timms does not accord with the evidence of Ms. Brown regarding the steps she took and the manner of completing the questionnaire and the chart.

[132] With regard to the video of the plaintiff on the front bumper of the truck bending over the hood, the duration was short and was fully explained by Mr. Timms in his evidence. Mr. Shew testified that these movements were consistent with the functional testing. With regard to the video of the plaintiff's brief walk in the store, there is some veering apparent. The walk is not inconsistent with the plaintiff's evidence. In its totality, the video does not detract from the credibility of the plaintiff.

[133] In the result, I find the plaintiff to be an entirely reliable and credible witness and I therefore accept his evidence.

B. The Plaintiff's Injuries

[134] I accept that the plaintiff has suffered injuries that can be categorised as physical, such as those soft tissue injuries of his neck and back, and also injuries arising from the mTBI as described by the neurologists. I will describe the physical injuries first.

[135] In so categorising the plaintiff's injuries, I have taken into account the theory of the defence which is that the other life circumstances suffered by the plaintiff in the years prior to and after the MVC have cumulatively resulted in the mental health issues suffered by the plaintiff. I will return to the defence submissions.

1. Physical Injuries

[136] Dr. Randall Locht was called as an expert orthopaedic surgeon on behalf of the defendant.

[137] In some respects, Dr. Locht's report minimises Mr. Timms' injuries. However, he opines that the collision caused the back injury which he diagnosed as nonspecific soft tissue injuries of the lower back/lumbar spine.

[138] After considering the historic MVC, the historic dirt bike collision, and the knee surgery, in Dr. Locht's opinion, which is consistent with Mr. Timms' medical history as well as Mr. Timms' evidence, "there are no recognized pre-existing medical conditions..." that put Mr. Timms at risk or that were exacerbated by the collision.

[139] Dr. Locht was of the opinion Mr. Timms is injured and was injured in the collision. In his practice he sees many patients with chronic pain and he described that:

- (a) An individual can have pain without any objective pathology that explains that pain.
- (b) Such pain can prevent individuals from working.
- (c) Such pain could constitute a "functional impairment".
- (d) He accepted the link between chronic pain and depression, that depression can be secondary to pain and that depression can exacerbate pain – he referred to the vicious cycle.
- (e) He accepted that pain can affect sleep leading to a further deterioration in condition.
- (f) He accepted that these various conditions can, individually and in combination, give rise to a deterioration in function over time.

2. The mTBI

[140] Two neurologists, Dr. Mehdiratta and Dr. Dommann, testified that Mr. Timms suffered an mTBI as a result of the collision.

[141] Mr. Timms raises issues with the evidence and report provided by Dr. Dommann.

[142] The Dommann Report has a number of typos, including in his reproduction of the questions posed by defence counsel. It is not evident that care was taken. Further, the Montreal Cognitive Assessment Test or MOCA administered by Dr. Dommann contains multiple errors: the “date” is marked incorrect but scored correct; there are inconsistencies noting the results; and the hands on the clock test indicate the wrong time.

[143] Dr. Dommann testified that he keeps electronic clinical records for his patients and agreed that makes them easier for others to read. He only keeps handwritten notes when he does Independent Medical Examinations despite knowing that they will be disclosed. He stated that he converts the handwritten notes into the report using voice recognition software but does not necessarily convert all the notes he

has taken. Dr. Dommann struggled to decipher some of his handwriting. Importantly, much of one passage that he deciphered does not appear anywhere in his report, being his note that Mr. Timms “is feeling pretty negative...” There is also an absence of reference to what he admitted were neurologically relevant entries in the medical records he reviewed. The plaintiff submits that it is not in conformity with an expert’s duties under Rule 11 to be of assistance to the court to keep illegible notes unless the expert transcribes the notes or otherwise records them verbatim and in their entirety within the report itself. He also says that all relevant information should be in the report.

[144] Substantively, Dr. Dommann repeatedly referenced the general population as part of his opinion regarding Mr. Timms. For example, he stated: “Usually, the symptoms of this resolved within a matter of months in some cases headaches can persist due to the triggering of a migraine headache disorder or due to cervicogenic headaches secondary to cervical spondylosis.” This is not specific to Mr. Timms. Dr. Dommann admitted under cross examination that it was a general statement.

[145] Dr. Dommann does not appear to believe that an mTBI can be a significant injury. However, Dr. Mehdiratta described this view as now outdated in reference to new Ontario government requirements to teach youth and parents about the dangers of long-terms effect of concussion in sport. There is now a far greater focus in the medical community now on preventing mTBIs and trying to intervene early.

[146] Dr. Dommann was fair in his agreements that:

- (a) Dr. Mehdiratta is a specialist in the area of acquired brain injuries and that Dr. Dommann is not;
- (b) Mr. Timms sustained a mTBI in the collision – although his report does not actually say this;
- (c) That Mr. Timms’ chronic headaches were caused by the mTBI; and
- (d) That friends, family, and maybe work supervisors would be the best source of information on how a person has changed.

[147] Dr. Dommann, to his credit as a witness, readily admitted many of the issues in his report and weaknesses in his opinion. It became clear that the only real area of disagreement between Dr. Dommann and Dr. Mehdiratta was in the seriousness of mTBI and the prognosis. However, Dr. Dommann did not opine that Mr. Timms has recovered or will recover. Again, he consistently discussed the majority of mTBI sufferers and their recovery, rather than Mr. Timms specifically. In the result, Dr. Dommann did agree that some people with mTBI never recover, that he is not suggesting Mr. Timms is lying about his symptoms, and that he ultimately offers no opinion on whether Mr. Timms has recovered.

[148] In the result, the lack of analysis, detail and explanation in his expert report and in his testimony causes me to place little weight on Dr. Dommann's evidence.

[149] Dr. Mehdiratta testified regarding the opinion set out in his report and summarised above. In thorough cross-examination he was not shaken, and further he was able to explain and expand upon his methodology, research and experience in support of his opinions.

[150] The defendant submits that Dr. Mehdiratta was an advocate for the plaintiff. I disagree. Where the answers were not as sought by the defendant, the responses took into account and explained the complexity of this type of brain injury where imaging and objective tests are not available, and the research is rapidly resulting in an expanding knowledge base. He described the process of exercising his clinical judgment.

[151] Further, although questioned on the use of a SPECT scan (although that area of his report had been redacted by consent), Dr. Mehdiratta was clear that it was a tool that did not make any difference in his diagnosis.

[152] After consideration of the reports and testimony of the two neurologists, I prefer the opinion of Dr. Mehdiratta. This is particularly so with respect to Mr. Timms' prognosis and likely permanent condition. I accept the evidence and opinion of Dr. Mehdiratta as summarized above in its entirety. Dr. Mehdiratta has significantly more experience in treating, researching, studying, and assessing

persons with acquired brain injuries. Dr. Mehdiratta is well qualified to opine regarding the diagnosis and long-term effects of mTBI, and he did so throughout with a depth and breadth of knowledge and experience.

[153] On the totality of the evidence, I agree with the plaintiff and find that the most likely diagnoses for injuries sustained by Mr. Timms are:

- (a) Non-specific soft-tissue injuries to:
 - (i) the back
 - (ii) the neck;
 - (iii) shoulder (resolved);
 - (iv) knee (resolved); and
 - (v) chest (resolved);
- (b) Chronic pain;
- (c) Mild traumatic brain injury (mTBI/concussion);
- (d) Post-concussion syndrome;
- (e) Post-traumatic migraines - chronic;
- (f) Post-traumatic vestibulopathy;
- (g) Post-traumatic vision syndrome; and
- (h) Chronic fatigue.

[154] As explained by Dr. Mehdiratta, these are part of the constellation of symptoms from an mTBI. It is not the label applied but the plaintiff's injuries, harms, and losses that is important in the assessment of damages. The court must find whether he has suffered losses, how those losses have affected him, what their severity is, and how long they can reasonably be expected to affect him.

[155] With regard to diagnosis and causation, the defendant's position is that the plaintiff's historic lupus diagnosis, other stressful events in Mr. Timms' life (the death of his sister, the death of his dog, his bankruptcy), and other differential diagnoses apply to Mr. Timms' symptoms. It appears to be the submission that unless the plaintiff can establish on the balance of probabilities that all of his symptoms result from the MVC as opposed to any other possible diagnosis that he has not met the burden of proof. However, that is not the law on causation.

[156] In *Burdett v. Eidse*, 2010 BCSC 219 the Court addressed a similar argument from the defendants in that case. Justice Loo stated:

[183] The defendants argue that there are a host of differential diagnoses that apply to Mr. Burdett's symptoms including fatigue, anxiety, depression, aging, and cerebrovascular disorder and that none of the alternative causes have been eliminated. The defendants contend that unless he establishes on a balance of probabilities that any current difficulties are the result of the accident rather than the other diagnoses, Mr. Burdett has not met the burden of proof.

[184] That, however, is not the legal test for causation. As stated by the Supreme Court of Canada in *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458, causation does not need to be determined with scientific precision. At paras. 13-19 the Court stated....

[185] Moreover, none of the experts suggest that Mr. Burdett's cognitive difficulties are caused by fatigue, anxiety, depression, or the initial states of dementia. While the experts agree that some of the symptoms of depression and fatigue may be similar to symptoms of a brain injury, none of the experts (except Dr. Knazan) were shaken in their opinion that Mr. Burdett's condition was caused by an MTBI. Even Dr. Knazan agrees that a small percentage of persons do not recover from an MTBI and are left with cognitive and emotional symptoms.

[157] In this case, Dr. Mehdiratta, was not shaken in his evidence. There is no evidence of any diagnosis of any mental health condition from an expert witness. The defendant points to a passage from the Dommann Report which makes the statement: "To exclude the possibility of a mood or anxiety disorder impacting his cognition, I would suggest a psychiatric assessment to evaluate him and discuss the aetiology, treatment and prognosis of a possible mood or anxiety disorder." There are no facts or assumptions upon which this statement could be based. Dr. Mehdiratta described the function of an psychiatric assessment as being to determine the best medication for the symptom of depression.

[158] The evidence of Mr. Timms' depressed mood supports the conclusion that this depression is secondary to the TBI and the chronic pain.

[159] There is no evidence that the type of serious cognitive difficulties the plaintiff is experiencing could be caused solely by depression. The cognitive testing done by Mr. Shew and described by him is consistent with the evidence regarding Mr. Timms' cognitive struggles.

[160] The defendant asks the court to speculate and to substitute its diagnosis of depression and other unspecified mental health diagnoses for the clear and reliable opinion of Dr. Mehdiratta. I decline to do so.

[161] There is no evidence that Mr. Timms suffered from depression, anxiety, PTSD, or any mental health condition prior to the collision. I conclude that the plaintiff's mental health issues are secondary to the mTBI and part of the constellation of symptoms caused by the MVC.

C. Prognosis

[162] A brain injury is not curable. The symptoms may increase and decrease in severity, but after this length of time, it is highly unlikely that they will not resolve. They may be treatable or amenable to palliation but are not curable. As Dr. Mehdiratta explained, his treatment recommendations will provide only symptomatic relief for a brief time. As Dr. Mehdiratta opined, it is more likely that not that any benefits from treatment will be palliative rather than curative.

[163] Dr. Mehdiratta was not contradicted regarding his prognosis. Dr. Lochter opined that Mr. Timms has reached maximal medical recovery in terms of his nonspecific soft tissue injuries, but offered no prognosis on, and was not qualified to, on chronic pain, the mTBI, emotional, psychological, or other issues.

[164] It has been over three and one half years since the MVC. Mr. Timms has not improved and is in many respects deteriorating. Dr. Mehdiratta opines in his report that the prognosis is poor, on balance his symptoms are permanent, and that he expects over the long-term that Mr. Timms will have increasing difficulty at work. Mr. Timms has seen some lightening of his depression – likely around the time he tried the anti-depressants from his GP, but he testified that he discontinued them when they increased his suicidal ideation. Mr. Timms testified that some of his soft-tissue injuries from the MVC have resolved being his chest, his temporarily aggravated knee, and his shoulder. Mr. Timms testified that his neck had improved since the early days after the MVC and now only bothered him for seconds when he

turns to the side but it does not last. The concussion rehab appears to be providing some relief.

[165] With regard to the constellation of symptoms, Dr. Locht agreed that pain, depression, sleep, and function all interplay. Dr. Mehdiratta described it as a vicious cycle: depressed mood reduces function; poor function depresses mood; anxiety impairs function, which causes more depression, and continuingly. All of these can further impair cognition. Each makes the other worse. All were caused by the MVC and the resulting mTBI.

IV. DAMAGES

A. Non-pecuniary Damages

[166] Non-pecuniary damages reflect non-tangible losses, and to provide compensation for a plaintiff's loss of enjoyment and expectation of life, and for pain and suffering: *Andrews v. Grand & Toy Alta. Ltd.*, [1978] 2 S.C.R. 229 at 262, 1978 CanLII 1 (S.C.C.); *Logan v. Smetaniuk*, 2003 BCSC 2002 at para. 11. In assessing non-pecuniary damages, the overarching principle is that the plaintiff is "entitled to be put in the position [they] would have been, absent the defendant's negligence, to the extent this can be done with money": *Pan v. Lau and Tai*, 2020 BCSC 288 at para. 37.

[167] Courts have long recognized, however, that "there is no medium of exchange for happiness" and putting a monetary value on non-pecuniary losses suffered is impossible: *Diello v. Montgomery*, 2005 BCCA 56 at para. 31, citing *Andrews* at 261 and *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 at para. 106, 1995 CanLII 72 (S.C.C.). Thus, the assessment of non-pecuniary damages is more a "philosophical and policy exercise" than a "legal or logical one": *Andrews* at 261.

[168] The dominant consideration when assessing non-pecuniary loss is "an appreciation of the individual's loss": *Corke v. Andrews*, 2015 BCSC 118 at para. 90, citing *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637, 1981 CanLII 35 (S.C.C.). The BC Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34, leave for appeal to SCC ref'd, 31373 (20 October 2006), set out a non-exhaustive list of common factors that

inform an award of non-pecuniary damages. The “*Stapley* factors” outlined by Justice Kirkpatrick at para. 46 are as follows:

- (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;
- ...
- (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...).

[citation omitted.]

Further, the reason for the non-pecuniary loss is irrelevant to the assessment.

[169] I will now apply the *Stapley* factors to the case at hand. Mr. Timms is 50 years old and was 46 at the time of the motor vehicle collision. As a result of the MVC, he suffered serious and painful injuries – including various soft tissue injuries and a brain injury (the “mild traumatic brain injury” or “mTBI”) – with ongoing physical and psychological symptoms that have significantly impacted his recreational, vocational and domestic activities, and have altered his personality and cognitive capabilities. As a result, he experiences chronic pain, daily headaches, some described as “violent”, vertigo, has issues with sleep and light sensitivity, and has problems with his vision. Most impactful are the constellation of ongoing cognitive, emotional and behavioural symptoms stemming from the brain injury.

[170] Mr. Timms’ pain and suffering, along with his loss of enjoyment of life, has been, and will likely continue to be, quite significant. Prior to the collision, he frequently engaged in housekeeping and yard maintenance, recreationally restored vehicles, and enjoyed exerting himself physically through extreme dirt biking and

hiking. His physical stamina was high, and he sometimes would dirt-bike 6 to 8 hours a trip. He was described by those who knew him as “tough, stubborn and tenacious”, and someone who “did not complain”. Indeed, prior to the MVC he had experienced serious injuries, a broken pelvis and collarbone, in his 20s due to a dirt bike crash, and had undergone a knee surgery, all of which he had made full recoveries at the time of the MVC.

[171] As a result of the MVC, Mr. Timms’ physical abilities have been significantly debilitated. His chronic pain has prevented him from completing basic housekeeping and yard maintenance tasks. If he does attempt domestic work, tasks are left undone and most of his days end in exhaustion. The pain in his back prevents Mr. Timms from sitting for more than an hour, and he rarely if ever works on vehicles because it aggravates his symptoms. Though he attempted to go dirt biking once or twice after the MVC, these trips were cut short due to pain in his neck and back, and to headaches. As a result, he has essentially ceased dirt biking. For similar reasons, he no longer hikes. Further, while his physical injuries prevent him from engaging in his former dirt biking and hiking activities, he also avoids them for fear he will get lost due to cognitive issues arising from the mTBI.

[172] Mr. Timms’ brain injury has resulted in cognitive deficits affecting memory and his ability to focus and concentrate. While he had no memory issues prior to the MVC, his memory is now significantly impaired, which is evident by his prolific use of sticky notes as reminders, his impaired sense of direction, and his repetitive behaviour. His ability to retain and comprehend information is diminished, as is his capacity to concentrate and focus.

[173] His sleep has become terrible which makes the other symptoms worse. These injuries, coupled with his physical limitations, have significantly affected his employment abilities in his work in construction as a lead hand detailer. Once able to lift over 80 pounds, he is now limited to 20 pounds. His excellent reputation within his work community has declined as his work quality has diminished and his supervisors are no longer comfortable recommending him for work. Though he has returned to modified employment, it is unlikely that he will be competitively

employable and future work will require significant accommodations to him to remain safe and functional.

[174] Once an active and a vibrant member in his community, his interpersonal relationships have suffered. He is a shell of the person he used to be. His injuries keep him home and he hermits, spending most of his time watching TV and YouTube alone. Further, while his demeanor pre-collision was that of a kind, gentle and generous man, he is now quick to anger and frustrates easily. In particular, his personality and behavioural changes have put a significant strain on his relationship with his partner; they are no longer sexually active and there have been incidents of aggression. Mr. Timms' sleep patterns have been affected and there is also evidence that he has experienced anxiety, depression and some suicidal ideation since the MVC. I accept that these symptoms are indicative of the constellation of issues experienced by Mr. Timms as a result of the MVC.

[175] In the almost four years since the collision his symptoms have improved very little, if at all, and his prognosis for recovery is poor. Every aspect of Mr. Timms' life has completely changed. The specifics of his condition are outlined above. He is stoic and tough and stubborn. As Ms. Hagensen testified, he keeps trying. However, the plaintiff has realized that his diminished abilities are resulting in a diminishing reputation in his industry and the bosses are beginning to figure out that he can no longer do the work he previously did.

[176] The plaintiff seeks an award of non-pecuniary damages of \$275,000. He cites the following cases in support:

- (a) *Burdett v. Eidse*, 2010 BCSC 219, rev'd in part on other grounds 2011 BCCA 191: The 53-year-old plaintiff was involved in two motor vehicle collisions. He worked as a contractor and owned his own business. He suffered soft tissue injuries and a concussion (mTBI) from the first collision, which were aggravated still by the second. He suffered cognitive impairment immediately after the first collision. The plaintiff also

suffered from depression and anxiety related to the collision. The mTBI prompted the most significant issues, resulting in severe cognitive impairment including issues with focus and concentration, sleep and multitasking. He was no longer competitively employable and unable to participate in his former extracurricular activities for fear of re-injury. The Court found that his condition would likely not improve and he would suffer the same problems for the rest of his life. Non-pecuniary damages of \$200,000 (\$262,010 currently) were awarded, and the Court noted:

[203] What is more significant is Mr. Burdett's MTBI – which has not resolved. He continues to suffer from severe cognitive impairments including an inability to focus, concentrate, sleep, or multitask; he experiences frustration, emotional lability, and a lack of interest in those activities that used to give him pleasure. He has lost his high-level executive functioning and is competitively unemployable. He no longer skis (on the advice of Dr. Cameron that he cannot afford to hit his head again). He attended one sail past, but no longer sails for fear of the boom hitting his head. He no longer reads for pleasure. His relationships with his wife, his family, and friends have been negatively affected.

- (b) *Lines v. Gordon*, 2006 BCSC 1929, rev'd in part on other grounds 2009 BCCA 106: The plaintiff was 28 years old at the time of the collision. He suffered an mTBI and profound post-concussion syndrome following a motor vehicle collision. The Court found that his injuries included chronic severe headaches with vestibular dysfunction, sexual dysfunction, vision problems, fatigue, depression and higher cognitive function and capacity such as memory, concentration, organization and decision making. The trial judge found that the plaintiff's enjoyment of life was "virtually destroyed", and while he was able to carry out certain pre-collision activities (like camping), he no longer enjoyed them. The Court found the on-going effect of this brain injury was profound and permanent, and his future plans of

becoming a Marine engineer would never come to fruition. Non-pecuniary damages of \$225,477 (\$317,477 in 2022) were awarded.

- (c) *Young v. Anderson*, 2008 BCSC 1306: The plaintiff was 51 years old at the time of the collision. The Court found that he had suffered an mTBI, tinnitus, dizziness and had issues with balance. He also experienced depression – which at one point involved suicidal ideation – though it was since in remission, and had symptoms of ongoing confusion and an inability to organize his work and social activities. The trial judge found that the plaintiff’s personality changed, he experienced chronic pain and was no longer able to work in his chosen profession. His marital relationship suffered: he and his spouse were no longer sexually intimate and his ability to interact with his spouse was diminished, both of which were exacerbated by his personality changes. Non-pecuniary damages of \$200,000 (\$268,646 in 2022) were awarded.
- (d) *Noftle v. Bartosch*, 2018 BCSC 766: The plaintiff was a 46-year-old female. She suffered injuries to her neck, collarbone, shoulders and mid back. She was diagnosed with chronic pain somatic symptom disorder and major depressive disorder, experienced mood swings, and was unable to sleep well. All aspects of her life were affected: she couldn’t work, play with her grandchildren or read them stories, or be intimate with her husband. Though the Court found there was a reasonable chance a chronic pain program would help the plaintiff manage her symptoms, it was found that her condition would likely not improve. Non-pecuniary damages of \$170,000 (\$194,973 in 2022) were awarded.

- (e) *Sirna v. Smolinski*, 2007 BCSC 967: The 23-year-old plaintiff suffered an mTBI – leaving her with permanent cognitive deficits – soft tissue injuries which continued without much resolution, and sense of smell was impaired. Though she had maintained employment since the collision, the Court found that her injuries would make it unlikely for this to continue. She also suffered reactive depression, and the trial judge found that ongoing treatment would be palliative in nature and directed towards alleviating physical/emotional flareups. Non-pecuniary damages of \$200,000 (\$275,627 in 2022) were awarded.

[177] The defendant submits that a more appropriate award is in the range of \$110,000 – \$150,000. In particular, the defendant argues for this lower range of damages on the grounds that the plaintiff has continued to remain employable and work since the MVC and that his emotional symptoms are due to factors unrelated to the MVC.

[178] Counsel for the defendant cites the following cases in support:

- (a) *Ratelle v. Barton*, 2022 BCSC 22: The plaintiff was 39-years-old when injured. The injuries impacted his athletic abilities, his mental health and ability to cope with tasks of everyday living. There was also optimism for future improvement of symptoms: He was awarded non-pecuniary damages of \$150,000.
- (b) *Chappell v. Loyie*, 2016 BCSC 1722: Prior to the collision, the plaintiff worked as a firefighter and did renovations and landscaping work. His injuries were serious and complex, and prevented him from returning to his prior occupations. The injuries suffered included to his feet, ankles (resolved), neck, back and shoulder. He also experienced an mTBI (resolved) and chronic headaches. The Court found that his depression and anxiety were also caused by the collision. Further, he was

no longer intimate with his wife and his relationships with his step sons were strained. He was awarded non-pecuniary damages of \$150,000 (\$177,855 in 2022).

- (c) *Aylen v. Mellin*, 2022 BCSC 223: The plaintiff was 22-years-old at the time of the collision. His injuries included pain to his neck, upper and lower back, and right hand. He was diagnosed with chronic myofascial pain, and he would likely experience chronic pain, migraines, mood impairment and sleep issues for the rest of his life. His physical abilities were “significantly impaired”. He also has some cognitive difficulties and had suffered an mTBI but had recovered by the time of trial: He was awarded damages of \$125,000.
- (d) *Mayede v. Dominguez*, 2020 BCSC 982: The plaintiff suffered chronic injuries from two MVCs and was 58-years-old at the time of trial. After the first MVC her pain was “unbearable”, but she was slowly improved and was able to return to work as a nurse. The second MVC aggravated her residual symptoms from the first collision, but again gradually improved with therapy. Her mental health suffered as a result of the collisions and her chronic pain has limited her ability to engage in her pre-collision physical activities. It has also affected her intimate relationship with her spouse. She was awarded damages of \$100,000 (\$111,854 in 2022).
- (e) *Steinlauf v. Doel*, 2021 BCSC 1118, aff’d 2022 BCCA 96: The plaintiff was a 26-year-old RCMP officer when he suffered injuries to his neck, shoulder, lower left leg and back in a collision. He also developed depression, anxiety, PTSD and cognitive difficulties. Post-collision he was partially disabled, experiencing serious psychological problems, had limited mobility and required daily medications to manage his symptoms. He was left with chronic pain and a heavy limp.

There was no chance of him returning to a career as a police officer and his prognosis was guarded. He was awarded \$225,000 (\$240,000 in 2022).

[179] Though awards of non-pecuniary damages in other cases provide useful guidance to the court, the assessment of appropriate damages will always be specific to each individual plaintiff's circumstances and experiences. The court, when considering awards made in other cases, must remember that no two plaintiffs will sustain the same injury, react to an injury in the same manner, or respond to treatment in the same way: *Jones v. Davenport*, 2008 BCSC 18 at para. 77. Additionally, the compensation award must be fair and reasonable to both parties: *Stapleton v. Andrew*, 2019 BCSC 678 at para. 63.

[180] However, none of the plaintiffs in *Ratelle*, *Chappell*, *Aylen*, *Mayede* or *Steinlauf* had an unresolved mTBI at the time of trial. In *Steinlauf*, the plaintiff had serious effects from PTSD as well as cognitive difficulties.

[181] After reviewing counsel's submissions, I find the cases of *Burdett* and *Young* to be of most assistance. While the complaints and circumstances are not identical in each case they share similar main features: a plaintiff of similar age suffering an unresolved mTBI with continuing behavioural and personality changes, cognitive deficits, chronic pain and headaches, depression and functional and vocational limitations, all of which will, or are likely too, endure for life.

[182] I would therefore assess pecuniary damages in the amount of \$235,000.

B. Past Income Loss

[183] A claim for compensation for past income loss capacity is a claim for the loss of the value of the work the plaintiff would have, not could have, earned but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30. The assessment of damages for past loss of earning capacity does not require mathematical certainty: *Karst v. Foster*, 2019 BCSC 1043 at para. 118.

[184] The defendant submits that the only evidence is that the plaintiff missed six days of work due to the collision. She says that the missed days indicated on the time sheets in evidence were not attributed to injuries or treatment that were collision related, but rather could be described as missed work days similar to those missed prior to the MVC.

[185] The plaintiff seeks an award of \$25,000 (net of taxes) for income loss from the date of the collision to the trial date.

[186] To determine the time Mr. Timms missed from work, the starting point is to look to his actual time worked and earnings during this period. Mr. Timms worked for Arkay Builders Inc. (“Arkay”) until March 2022, earning \$33.50 by the end of his employment there.

[187] In March 2022, Mr. Timms switched jobs, starting at Quolus, where he earned \$36.00 per hour. At one-point Mr. Timms was paid as a sub-contractor, though this affects only his tax treatment and income reporting for the CRA – not his actual earnings.

[188] The annual income records from Arkay indicate:

Year	T5018	T4 Income	Total:
2017	\$71,178		\$71,178
2018	\$40,100		\$40,100
2019	\$60,535		\$60,535
2020	\$15,787	\$33,907	\$49,694
2021		\$65,352	\$65,352
2022 to 12 Mar 2022		\$16,687	\$16,687

[189] The plaintiff submits that from the date of the 2019 MVC to the end of his employment with Arkay in March, 2022 (eight months before trial), he missed a total of 636 hours from work (including missed or shortened days from an eight-hour shift). This total does not include time missed for WorkSafe reasons, being other injuries. The work missed only in the first year is comprised of six full days of work,

followed by four consecutive days of reduced hours resulting in nine more hours of missed work, or 33 full days (264 hours); plus 61.5 hours, or 325.5 hours.

[190] Mr. Timms testified that although he did not specifically remember, in addition to the six days after the MVC, he took some Fridays off to make long weekends to try and rest and further recover. He also shortened many of his workdays for treatment and recovery, as Ms. Hagensen testified.

[191] Approaching the assessment from the evidence, in the years after the MVC and before the trial, there were 44 months. From his timesheets it appears that as time went on post-collision, he took fewer than two Fridays per month which were not attributed to other injuries. That equals less than the maximum of 88 days and with the six days missed in March 2019, is a total of less than 94 days or less than the 752 hours maximum ($88 + 6 + 94 \times 8 \text{ hours/day} = 752 \text{ hours}$).

[192] However, Mr. Timms also took time off work for treatments, and for ease of assessment, I would attribute his combined time off work for missed days and treatments as being an average of two days per month for the first two years (or twenty-four months, totalling 48 days), then approximately 18 days per year for the remaining months. Together with the six days missed post-collision, I estimate the days of missed work at 80, and thus the hours of missed work at 640.

[193] Mr. Timms' evidence was that in 2020 he received a \$1.00 per hour raise, followed by a \$.50 per hour raise in 2021 (bringing his Arkay earnings to \$33.50 per hour in 2022). Thus, in 2019 he earned \$32 per hour.

[194] At \$32 per hour, 640 hours missed to the date of trial equals \$20,480. Additionally, Mr. Timms testified that he previously worked overtime as indicated on his timesheets.

[195] I am satisfied that this rough calculation at the lower hourly rate fairly assesses Mr. Timms' past wage loss because although there were months that there were not two Fridays of missed work attributable to the MVC, there are also

hours missed for the numerous treatments and appointments Mr. Timms' attended for the period from 2019 to 2022.

[196] Further, there is nothing in the evidence to suggest that the negative and positive contingencies are not roughly offsetting. In other words, it is roughly equally likely that Mr. Timms would have suffered another injury and missed work, or that he would have received a promotion or other position with an increase in income.

[197] I therefore find that the amount of \$21,000 is fair and reasonable. Past wage loss is assessed in that amount before tax.

C. Loss of Future Earning Capacity

[198] The British Columbia Court of Appeal has, in a number of recent decisions, clarified the principles with respect to awards for future earning capacity. In *Ploskon-Ciesla v Brophy*, 2022 BCCA 217, the operative principles are summarized:

Operative Principles

[7] The assessment of an individual's loss of future earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. This is not a mathematical exercise; it is an assessment, but one that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment in issue: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. Despite this lack of mathematical precision, economic and statistical evidence "provide[s] a useful tool to assist in determining what is fair and reasonable in the circumstances": *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21, citing *Parypa v. Wickware*, 1999 BCCA 88 at para. 70.

[8] Courts should undertake a tripartite test to assess damages for the loss of future earning capacity. In *Rab v. Prescott*, 2021 BCCA 345, Grauer J.A. clarified this approach. Although the judge did not have the benefit of *Rab* when he wrote his reasons, the principles summarized therein are not novel; they have been the applicable law for a considerable time.

[9] I will repeat those principles here, drawing heavily on *Rab*. I do so because it is clear the judge did not undertake the requisite steps when assessing damages, nor did he make the findings of fact necessary to quantify an award. This dearth of analysis leaves us to speculate on the basis for the award, as it did in *Schenker v. Scott*, 2014 BCCA 203 at paras. 55–56.

[10] Justice Grauer in *Rab* described the three steps to assess damages for the loss of future earning capacity:

[47] ... 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.

First Step

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

[12] Second, with respect to the second set of cases, that is, situations in which there has been no clear loss of income at the time of trial, the *Brown* factors, as outlined in *Brown v. Golaij* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 (S.C.), come into play. The *Brown* factors are, according to *Rab*, considerations that:

[36] ... 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.

[37] If there has been a loss of the capital asset, the question then becomes whether there is a real and substantial possibility of that impairment or diminishment leading to a loss of income.

[13] For ease of reference, the *Brown* considerations set out at para. 8 of that decision 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.

[14] Recall, however, that a plaintiff is not entitled to an award for a loss of earning capacity in the absence of any real and substantial possibility of a future event leading to income loss: *Rab*; *Perren v. Lalari*, 2010 BCCA 140. That is, even if the plaintiff makes out one or more of the Brown factors, and thus demonstrates a loss of earning capacity, this does not necessarily mean they have made out a real and substantial possibility this diminished earning capacity would lead to a loss of income in their particular circumstances. This is where the second step comes in.

Second Step

[15] The reference to paras. 93–95 of *Dornan v. Silva*, 2021 BCCA 228, in para. 47 of *Rab*, above, regards the standard of proof at this stage: a real and substantial possibility. This standard of proof “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.

Third Step

[16] As touched upon above, depending on the circumstances, the third and final step—valuation—may involve either the “earnings approach” or the “capital asset approach”: *Perren* at para. 32. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.

[17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Brown* at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff’s potential future.

[199] The Court of Appeal in *Steinlauf* also discussed this third step, focusing on the quantification of the damages on the basis of relative likelihoods, as involving “a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff’s likely future after the accident has happened”: at para. 55, citing *Gregory* at para. 32. Thus, the court must assess the plaintiff’s without-accident

earning potential and what the plaintiff was likely to earn as a result of the accident: *Steinlauf* at para. 56; *Dornan* at para. 156.

[200] Ultimately, if the plaintiff establishes a real and substantial possibility of future loss, then the court must assess the likelihood of potential hypothetical events – positive and negative contingencies – that could affect quantification of that loss.

[201] Justice Horsman in *Rattan v. Li*, 2022 BCSC 648 summarized the role of contingencies in the court’s assessment, noting:

[147] Contingencies may be general or specific. A general contingency is an event, such as a promotion or illness, that, as a matter of human experience, is likely to be a common future for everyone. A specific contingency is something peculiar to the plaintiff. If a plaintiff or defendant relies on a specific contingency, positive or negative, they must be able to point to evidence that supports an allowance for that contingency. General contingencies are less susceptible to proof. The court may adjust an award to give effect to general contingencies, even in the absence of evidence specific to the plaintiff, but such an adjustment should be modest: *Steinlauf v. Deol*, 2022 BCCA 96 at para. 91, citing *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).

[emphasis added.]

[202] Further, as emphasized by the Court of Appeal in *Steinlauf*, the court has discretion to reject or accept contingencies on the basis of the totality of the evidence, whether positive or negative, general or specific. In *Steinlauf*, the trial judge had awarded the plaintiff substantial damages for lost earning capacity, having accepted that his without-accident career path would have been one of outstanding professional success. The defendants, on appeal, argued that the trial judge had failed to apply a number of relevant general negative contingencies to the award. The Court of Appeal, upholding the trial judge’s award, explained the assessment of contingencies as follows:

84 ... [W]here an assessment of lost future earning capacity is based upon a projected career path reaching well into the future that involves a number of promotions and steps, it is appropriate for the judge to consider making an allowance for the contingency that the assumptions on which the award is predicated may prove inaccurate -- so long as any resulting deduction does not duplicate a reduction arising from a relative likelihood analysis.

85 While this process may result in a deduction in some cases, it will not do so in all...It will depend on the totality of the circumstances...

...

90 Here, the appellants point to no such specific contingency arising from the evidence, as there was in *Dornan*, or to any measurable risk that the judge failed to take into account, as there was in *Lo*. The appellants instead rely on the concept of a general contingency, the risk that things do not always turn out as expected.

91 The difference between specific contingencies and general contingencies was discussed by the Court of Appeal for *Ontario in Graham* (cited with approval by this Court in *Hussack v Chilliwack School District No. 33*, 2011 BCCA 258 at para 93, and in *Dornan* at para 92):

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. ...

[Emphasis added by the BCCA in *Steinlauf*]

92 The question, then, is whether it was an error for the judge not to have applied a general contingency deduction.

93 In my opinion, it would be wrong to characterize the judge’s findings here, as the appellants would have it, as amounting to finding that the appellant would have achieved the career path of a “superstar” as a near certainty, looking only at the “ups”, without taking into account the possibility of “downs” or of potential inaccuracies. ...

D. Future Capacity Loss – Steps 1 and 2 – Potential Future Event and Real and Substantial Possibility

[203] This case with Mr. Timms falls into the second type of cases described in *Ploskon-Ciesla*: “less clear-cut cases, including those in which a plaintiff’s injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident”: at para. 11. As outlined in the table above, it is apparent that

Mr. Timms' income at the time of trial is at, or near, the level of earnings for the years before the collision.

[204] Mr. Timms submits the evidence clearly establishes a potential future event likely to cause a loss of income. He further submits that the evidence supports a real and substantial possibility that he will be completely unable to work due to his injuries, and that his injuries – including his chronic pain, migraine headaches, cognitive deficits, balance issues, and other symptoms and effects – will continue indefinitely.

[205] The defendant's position is that there should be no award for loss of future earning capacity because, aside for a period of six days, Mr. Timms has been working full time since the collision. She argues that the plaintiff missed more work pre-accident due to his knee surgery and subsequent rehabilitation, and from the intervening elbow injuries in 2020 and 2021, than the MVC accounted for.

[206] The defendant, in her closing written submissions, states:

The Plaintiff, as set out in his Closing Submissions, seems to be adopting the earnings approach, and appears to be characterizing the step 1 “whether the evidence discloses a potential future event that could lead to a loss of capacity” test as being met as a matter of right. It appears that the “event”, as characterized by the Plaintiff, is complete disability or retirement from work, with no residual capacity to work at all, commencing January 1, 2023 (approximately two weeks after the conclusion of the trial). This is in contradiction to the Expert Report of Dominic Shew, the Mehdiratta Report, the Loch Report, and the Dommann Report. None of the Expert Reports provide any detail as to if or when the Plaintiff might cease to be capable of working in a full-time capacity, and certainly do not even suggest that total disability or inability to find work will occur two weeks after the conclusion of the trial.

The Defendant submits that there has been no loss of capacity, or if there has, it is not possible to determine the effect that may have on the Plaintiff's future earnings without resorting to the speculation that *Athey* warns against.

In the alternative, if the court were to find a loss of capacity, a capital asset approach should be taken. Mr. Timms has been in the same role as Construction Detailer or Lead Hand Detailer (depending on the project) for a number of years predating and since the accident to the time of trial, his income has increased since the Accident, and because there is no evidence before the Court of an annual income loss, or even the ability to speculate on an annual income loss, this is clearly a situation in which the capital asset

approach is appropriate. The use of the “Pallos Approach” of awarding one or two years income is stated with approval in *Rab*.

[207] The evidence relevant to the determination of the first step includes that of Mr. Timms. He testified that as outlined above, he continues to suffer from the symptoms of the MVC. Those symptoms include his headaches, ongoing back pain as well as some neck pain, and symptoms resulting from the mTBI which include poor sleep and exhaustion, lack of balance, impaired vision, memory and sense of direction, and anger outbursts. The latter is indicative of his personality change which is exemplified by the change in intensity and tone of his previously amiable Ford vs. Chevy debates with his best friend.

[208] Dr. Mehdiratta characterised these symptoms as typical of post-concussion syndrome and opined that persons with post-concussive symptoms more than 1.5 years following an accident are more likely than not to have permanent symptoms. Further, he opined that the treatments he recommended would only help reduce symptoms, and that they would be required on an ongoing basis. The treatments would likely only provide symptomatic relief that would tend to briefly improve the symptoms. In his testimony he also discussed neurological causes of ongoing back pain.

[209] Dr. Dommann does not offer an alternative prognosis. Although he suggested that there may be some further treatment that could be attempted to help with the headaches, he does not opine on whether successful treatment of the headaches would have any effect on other symptoms Mr. Timms’ experiences.

[210] I am satisfied on the evidence and on the *Brown* analysis that the evidence discloses a potential future event that could lead to a loss of capacity. The chronic back pain and the ongoing post-concussion symptoms will continue and become cumulative. The evidence establishes that Mr. Timms has been rendered less capable overall from earning income from all types of employment. He is less marketable as an employee to potential employers. He 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 he is less valuable to himself as a person capable of earning income in a competitive labour market.

[211] The totality of the evidence also establishes that there is a real and substantial possibility of there being an impact on Mr. Timms' income earning abilities as a result of the future event caused by the collision, or that the future event will cause a pecuniary loss.

[212] With respect to residual capacity, the evidence clearly shows that Mr. Timms is not competitively employable. The plaintiff works in an industry where the only concern is long it takes to complete a job. The relationship between the plaintiff and the companies that operate the building sites is not one of employment – there exists no duty of accommodation or any of the other protections that may be offered to an employee from an employer. Mr. Timms testified that his bosses have no loyalty to their employees.

[213] Mr. Timms stated that he has already been fired from one job site which is the first time this has occurred in 17 years. He testified that the site super who fired him from the job site did not owe him anything, nor did they have any obligation to inform him as to why he was fired. Mr. Millar also testified that if he is to discharge someone from one of his sites, he expects to never see them again on future sites and that the site supers know each other and talk about the workers in the industry. That the plaintiff has managed to hang on as long as he has is to his credit.

[214] The expert evidence of Mr. Shew addressed the question of Mr. Timms' capacity. I accept his findings as outlined above. In doing so, I have considered the submissions of the defendant that cross-examination of Mr. Shew demonstrated that he mis-applied the DOT and NOC classifications and thus was in error regarding the appropriate category of Mr. Timms' work and the relevance of his capacity to lift certain weights. I attribute no weight to this submission. The evidence of Mr. Shew regarding the capacity to lift weights was but one of the factors that he thoroughly considered (including the cognitive deficits) in making his findings regarding the impairment of the plaintiff's abilities as a result of the collision. In other words,

Mr. Timms' employment requires many capabilities, and many of them, including the capacity to lift, have been impaired by the collision injuries thus resulting in Mr. Shew's opinions which I accept including that it is unlikely that Mr. Timms will be competitively employable on a part and/or full time durable basis at such an occupation in an unlimited manner.

[215] Given the real and substantial possibility of Mr. Timms' injuries continuing indefinitely and greatly impacting his income earning abilities for the rest of his working life, the Court must next engage in the third step of the analysis. This requires an assessment of Mr. Timms' without-accident earning potential, and what the plaintiff was likely to earn as a result of the accident.

E. Loss of Capacity – Quantum Assessment and Relative Likelihood

[216] I have found that there is a real and substantial possibility that Mr. Timms will be largely unable to work as a result of the injuries from the MVC, thus resulting in a near-total loss of income. I must now assess the relative likelihood of that occurring and make an award based on that likelihood.

[217] Mr. Timms testified that prior to the collision he had not thought much about when he would retire. Now, he says, he will keep doing what he is doing until he cannot. Mr. Timms will not be eligible for Old Age Security until he is 67. For a worker in his position with no savings and no pension, a goal of working until 70 was the more likely option if his health and injuries permitted it.

[218] But for the crash, it is likely that Mr. Timms would have continued his role as a lead hand detailer, moving up into a position of Quality Supervisor ("QS") or Assistant Site Supervisor as he aged. Mr. Millar described that being the traditional path in the construction industry. Mr. Timms had the skills and reputation before the collision to be suited for those positions.

[219] There was no expert economist evidence provided. The plaintiff submits that his earnings absent the injuries from the collision should reasonably be assessed at

\$65,000 per year. As noted above, his current rate is \$36.00 per hour, which (working for 40 hours per week, 52 weeks a year) is \$74,880 per year.

[220] The plaintiff testified that prior to the collision, he would take occasional days off from work various reasons, including illness and leisure, although he was not sure how many. The Arkay records illustrate that from March 2017, Mr. Timms worked on average 35 hours per week (not including overtime, or weeks off for Work Safe matters). The plaintiff submits that these records provide the Court with some measure by which to assess the amount of time off he would have likely taken. Thus, at his rate of pay, working 35 hours per week for 52 weeks equals \$65,520 per year. Mr. Timms says that this amount takes into account significant negative contingencies, specifically that his earnings would not increase going forward and that he would not be promoted to a higher paying position.

[221] The following table submitted by the plaintiff shows his 100% loss at \$65,000 per year from 2023 to 2042 (the year Mr. Timms turns 70) using the 1.5% discount rate from the *Law and Equity Act*. His without-accident earnings are indicated as follows:

Age	Year	Should Have	Residual	Loss	Present Value Discounting				Cumulative Factorial
					Rate	Years	Factorial	Discounted	
Total				\$1,099,469.48					
50	2022			\$0.00	1.5%	1	0.9852	\$0.00	0.9852
51	2023	\$65,000.00		\$65,000.00	1.5%	2	0.9707	\$63,093.01	1.9559
52	2024	\$65,000.00		\$65,000.00	1.5%	3	0.9563	\$62,160.60	2.9122
53	2025	\$65,000.00		\$65,000.00	1.5%	4	0.9422	\$61,241.97	3.8544
54	2026	\$65,000.00		\$65,000.00	1.5%	5	0.9283	\$60,336.92	4.7826
55	2027	\$65,000.00		\$65,000.00	1.5%	6	0.9145	\$59,445.24	5.6972
56	2028	\$65,000.00		\$65,000.00	1.5%	7	0.9010	\$58,566.74	6.5982
57	2029	\$65,000.00		\$65,000.00	1.5%	8	0.8877	\$57,701.22	7.4859
58	2030	\$65,000.00		\$65,000.00	1.5%	9	0.8746	\$56,848.50	8.3605
59	2031	\$65,000.00		\$65,000.00	1.5%	10	0.8617	\$56,008.37	9.2222
60	2032	\$65,000.00		\$65,000.00	1.5%	11	0.8489	\$55,180.66	10.0711
61	2033	\$65,000.00		\$65,000.00	1.5%	12	0.8364	\$54,365.18	10.9075
62	2034	\$65,000.00		\$65,000.00	1.5%	13	0.8240	\$53,561.76	11.7315
63	2035	\$65,000.00		\$65,000.00	1.5%	14	0.8118	\$52,770.20	12.5434
64	2036	\$65,000.00		\$65,000.00	1.5%	15	0.7999	\$51,990.35	13.3432
65	2037	\$65,000.00		\$65,000.00	1.5%	16	0.7880	\$51,222.02	14.1313
66	2038	\$65,000.00		\$65,000.00	1.5%	17	0.7764	\$50,465.04	14.9076
67	2039	\$65,000.00		\$65,000.00	1.5%	18	0.7649	\$49,719.25	15.6726
68	2040	\$65,000.00		\$65,000.00	1.5%	19	0.7536	\$48,984.49	16.4262
69	2041	\$65,000.00		\$65,000.00	1.5%	20	0.7425	\$48,260.58	17.1686
70	2042	\$65,000.00		\$65,000.00	1.5%	21	0.7315	\$47,547.37	17.9001

[222] The plaintiff submits that his likelihood of experiencing a total loss is high, if not a certainty, given his negative prognosis, his progress to date and the likelihood that his condition is permanent and will further deteriorate.

[223] Using an income level of \$65,000 per year, Mr. Timms' total loss from 2023 onwards amounts to a present value of \$1,099,469. The plaintiff provided the following calculations:

- (a) 40% - \$439,787
- (b) 50% - \$549,735
- (c) 60% - \$659,681
- (d) 70% - \$769,628
- (e) 80% - \$879,575
- (f) 90% - \$989,522

[224] The plaintiff submits that the most likely scenario is 80%, or \$879,575 because it is supported by the evidence, accounts for negative and positive contingencies, including that the plaintiff will continue to work in some capacity for the short-term. Thus, the plaintiff says that he ought to be awarded \$900,000 for the loss of capacity, or approximately \$45,000 a year for the remainder of his working life.

[225] However, as stated in *Ploskon-Ciesla* at para. 17, in cases such as this where there has been no loss of income at the time of trial, courts should generally undertake the capital asset approach to reflect the fact that it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity which is a capital asset.

[226] In order to assess the loss of future earning capacity by way of the capital asset approach I commence with repeating the evidence of Mr. Shew that Mr. Timms is "...unlikely to be competitively employable on a part and/or full time, durable basis as such an occupation in an unlimited manner.... He is capable of performing intermittent periods of activity but will require significant accommodations...." From that statement I assess the relative likelihood of Mr. Timms becoming unable to earn income at 90%. His residual capacity is

assessed at 10%. This takes into account that he may find some work at occasional construction-related jobs that do not require heavy lifting, work on ladders, or other challenges which he is unable to meet due to his symptoms.

[227] The plaintiff's evidence establishes that there was a real and substantial possibility that if not for the injuries arising from the collision, he would have moved into a QS or perhaps eventually an Assistant Site Supervisor position. Regarding the QS position, Mr. Millar testified that pre-collision, Mr. Timms was ideally suited for it. Post-collision, however, specifically by the Hadleigh project's end, it became apparent to Mr. Millar that Mr. Timms was no longer suitable for the position. The plaintiff echoed this, testifying that although he was offered the QS position, he turned it down because he knew he did not have the cognitive skills to manage the scheduling, sequencing of tasks, and all the paperwork involved. I understood that although ten years ago, he did not prefer to work as a QS, at this stage of his life but for the collision it would have been a natural progression.

[228] From the date of trial, I conclude that Mr. Timms was likely to want to work until age 70, or another 20 years. He would have been employed as a QS, given his work record and excellent reputation in the industry, and thus earned more than \$65,000 per year. Regarding work-place injuries, given that likelihood of him doing more work in supervision as a QS rather than hands-on construction, it would be relatively less likely that he would suffer further workplace injuries. It is unlikely that the plaintiff would have retired early by choice.

[229] However, given his involvement in and love of extreme sports and history of injuries, it was likely that he would have been re-injured thus resulting in an earlier retirement. To his credit, he did not live a sedentary lifestyle. Gazing into "the crystal ball" as referenced in the case law, I estimate leaving the work force at age 68.

[230] There is an issue as to when the plaintiff, still employed now with his post-collision injuries, will no longer be able to work. It is a question of when, not if, he will no longer be able to work full-time. As Mr. Timms testified, he will work until he

cannot. I find that the evidence indicates that “cannot” is comprised of two factors: his injuries, including the mTBI as well as the soft-tissue injuries, are increasingly preventing him from productively working although he is stubborn, stoic and tough and is still continuing to try. And employers of detailers in the construction industry are becoming aware that Mr. Timms no longer does the excellent work he was known for. His diminishing reputation is catching up with him, and with that he is either not sought as a detailer or specifically refused by site supervisors such as Mr. Millar because they have a responsibility to hire the best workers to get their work done as well and quickly as possible. Time is money in the industry. Working full-time one year post trial is, in my view, the maximum likely duration. By that time the plaintiff either will not get work or will not have the ability to continue full-time work or both.

[231] There is not any evidence regarding the annual earnings of a person in a QS position, and it is assumed that there is a range of pay dependent on many factors including experience, size of project and crew, and specific duties required at each site.

[232] Therefore, I will utilise the present earnings of Mr. Timms, \$65,000 per year, recognising that by doing so I have applied a specific negative contingency since I have found it is likely that he would have earned a greater amount.

[233] Continuing the assessment, an income loss of \$58,500 per year (90% of \$65,000), in my opinion, is a reasonable maximum measure of lost capacity. For 17 years, that amount is \$994,500. I would discount the maximum annual loss by 25% considering the overall fairness and reasonableness of the award in light of all the evidence. Thus, the award for future loss of earning capacity is \$745,875.

[234] I note that there are similarities between the plaintiff’s income approach and my application of the capital asset approach. Given that the plaintiff will be losing almost all of his income, but he has not yet, in some manner the capital and income approaches merge.

F. Loss of Housekeeping Capacity

[235] An injured plaintiff who has established a loss of housekeeping capacity is entitled to be compensated for that loss: see *Campbell v. Banman*, 2009 BCCA 484. In *Kim v. Lin*, 2016 BCSC 2405 [*Kim BCSC*], affirmed 2018 BCCA 77 [*Kim BCCA*], Justice Sewell, in discussing the court's assessment of loss of housekeeping capacity, outlined that:

189 ...Care should be taken [...] not to duplicate awards under different heads of damage and thereby overcompensate a plaintiff.

190 In this case, I find that Ms. Kim has suffered a profound loss of capacity, both to perform household tasks and carry out childcare responsibilities. She is entitled to be compensated for that loss. As with any other head of damages, the loss must be justified on the evidence and any award must be reasonable in the circumstances.

191 A plaintiff is entitled to claim damages both for loss of past and future housekeeping capacity. An award for loss of housekeeping capacity recognizes that work for which a person does not get paid nevertheless has value to that person and others who benefit from it.

[236] The plaintiff highlights Justice Sewell's finding (affirmed in *Kim BCCA* at para. 35) that loss of housekeeping capacity should be assessed using the same principles as when assessing the uncertain happening of future events, despite previous jurisprudence endorsing a more cautious approach under this head of damage.

[237] The Court of Appeal has also affirmed that the classification of the head of damage may vary depending on the circumstances: *McTavish v. MacGillivray*, 2000 BCCA 164. Indeed, in *Kim BCCA*, the Court reaffirmed that it is the trial judge's discretion to determine if such a claim should be part of the non-pecuniary loss or as a segregated pecuniary head of damage: at para. 33. When determining where best to assess loss of housekeeping capacity, the Court in *Riley v. Ritsco*, 2018 BCCA 366, the Court held:

[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.

[238] Before the collision, the plaintiff testified that he spent a significant time completing household duties, primarily the outdoor and heavier activities like pressure washing, household repairs, and mowing the lawn. The list of his unfinished projects provided by Ms. Hagensen illustrates the extent of Mr. Timms' household work. Ms. also Hagensen testified that Mr. Timms was a good "oven cooker", and that he vacuumed and did his laundry. Now, the uncontradicted evidence is that Mr. Timms does little, if any, household chores and the responsibility falls on Ms. Hagensen.

[239] It is unlikely that Mr. Timms will ever recover to the point of being able to fully manage household duties to that of his pre-collision level. Dr. Mehdiratta opined that he is at least partially disabled in relation to housekeeping and home maintenance tasks. Mr. Timms' restrictions for engaging in housekeeping and yard work were addressed by Dominic Shew in his report.

[240] The plaintiff submits and I agree that a distinct award is appropriate in his case. The valuation of loss of housekeeping capacity varies widely and is highly case dependent.

[241] An award is sought for past loss of housekeeping capacity as well as for future loss. The plaintiff relies on Mr. Shew's calculations of an average of \$35 per hour for twenty hours of household tasks per week of primary and secondary activities from the collision to present (calculated as 135 weeks). The amount of \$94,500 is submitted to be an appropriate value. However, there is no evidence that Mr. Timms and Ms. Hagensen retained outside housekeeping assistance such that the award should be based on a reimbursement of expenses incurred. Rather, the award is for the loss of capacity to perform such housekeeping tasks.

[242] Taking into account the totality of the evidence, and applying the principles regarding an uncertain future event, and recognising that the specific duties will be included below in the cost of future care, I award the amount of \$35,000 as a separate head of damages for this loss of capacity, past and future.

G. Future Cost of Care

[243] The test for awarding cost of future care was addressed in *Andrews v. Grand & Toy* [1978] 2 SCR 229:

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 the position he would have been in if he had 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 a claim.

[244] More recently, the Court of Appeal in *Quigley v. Jonsen*, 2021 BCCA 33 reaffirmed the *Andrews* test:

43 The purpose of the award for costs of future care is to restore the injured party to the position she would have been in had the accident not occurred: *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 (S.C.C.) at p. 462; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29. This is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, adopted in *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.

[underlining added]

[245] A claim for future care may be established if (1) there is medical justification for the claim, (2) the claim is reasonable, and (3) the expense is likely to be incurred by the plaintiff: *Audet v. Chan*, 2018 BCSC 1123 at paras. 113–115, citing *Milina* at paras. 184, 211; *Hardychuk v. Johnstone*, 2012 BCSC 1359 at paras. 210–212.

[246] If the evidence does not establish the it is reasonably likely that the plaintiff will incur a specific expense, the plaintiff cannot be compensated for it. If the plaintiff has not used or sought out a service in the past, it will usually be difficult for her to justify a claim in respect of that service: *Warick v. Diwell*, 2018 BCCA 53 at para. 55.

[247] Mr. Timms is 50 years old. He submits that according to the StatsCan Life Tables for BC, his basic life expectancy is 32.81 more years. Life expectancy means that 50% of an age cohort is expected to reach that age. Thus Mr. Timms has a 50% chance of living to age 83. If Mr. Timms were 83 now, then his life

expectancy would be a further 7.85 years meaning he would have a 50% chance of living to 91. Mr. Timms therefore says that he has a 25% chance of living to 91. For the purposes of this assessment, I accept the plaintiff’s submission given the present restrictions in having additional expert evidence with an actuarial opinion regarding life expectancy.

[248] Mr. Timms’ cost of future care claim for his various recommended therapies, medications and services relies on Mr. Shew’s opinion. His report and testimony were not seriously challenged in cross-examination. I accept Mr. Shew’s report. Although I do not agree with all of his recommendations in my interpretation of the law and the evidence at trial, each of his opinions was based on his experience, testing, and interviews with Mr. Timms.

[249] Based on the opinion from Mr. Shew, Mr. Timms seeks the amounts in the table below. When Mr. Shew provided ranges the mid-point number is used. Where Mr. Shew was unable to concretely estimate the amount, these items are not included:

Item:	One-time Cost:	Recurring cost:	Frequency:	Years to:	
				33	41
				Total to age 83:	Total to age 91:
Assistive or Adaptive Aids p.10	\$ 250.00	\$ 250.00	2.5	\$ 3,300.00	\$ 4,100.00
Interior Cleaning p. 10		\$ 2,417.00	annual	\$ 79,761.00	\$ 99,097.00
Yardwork p. 11		\$ 1,906.00	annual	\$ 62,898.00	\$ 78,146.00
Pressure Washing p. 11		\$ 520.00	annual	\$ 17,160.00	\$ 21,320.00
Cleaning Gutters p.12		\$ 197.00	annual	\$ 6,501.00	\$ 8,077.00
Household repairs p.12		\$ 2,086.00	annual	\$ 68,838.00	\$ 85,526.00
Concussion Rehab p.13	\$ 1,840.00				
OT p. 14	\$ 2,596.00				
travel for OT p.14	\$ 725.50				
Psych Therapy (Ind) p.15	\$ 2,812.50				
Couples Counselling p.15	\$ 2,925.00				
Prescription p. 15		\$ 233.00	annual	\$ 7,689.00	\$ 9,553.00
OTC meds p.16	\$ 113.50		annual	\$ 3,745.50	\$ 4,653.50
Cannabis p.16	\$ 3,930.50		annual	\$ 129,706.50	\$ 161,150.50
Neuropsych Testing p.16	\$ 3,587.50	unknown			
Vocational consult p. 17	\$ 1,650.00				
Botox p.18		\$ 2,488.00	annual		
Physio p. 18		\$ 1,110.00	annual	\$ 36,630.00	\$ 45,510.00
Ajovy					
Totals:	\$ 20,430.50			\$ 416,229.00	\$ 517,133.00

[250] Based on the above amounts, Mr. Timms' says that his total potential loss for the future care items listed is \$517,133 to age 91 plus \$20,430.50 for one-time costs. He submits that the Court need not assess the relative likelihood that he would need each individual item, rather the Court can undertake this assessment as a whole. He submits that using a 60% relative likelihood across the board balances the positive and negative contingencies regarding life expectancy, improvement versus deterioration of the plaintiff's condition, as well as accounts for the present value of these amounts using the 2% discount rate for future care items mandated by the *Law and Equity Act*. At 60% the claim for the above items is \$310,279.80.

[251] In my view, it is necessary to assess the relative likelihood of his need for each category of items rather than as a list as a whole.

[252] I turn first to the housekeeping category. The total claimed to age 91 is \$296,266 including assistive aids, interior cleaning, yardwork, pressure washing, cleaning gutters, and household repairs. I would apply a 55% discount to this amount for two reasons. Firstly, Dr. Mehdiratta's opinion is that Mr. Timms is partially disabled from being able to do these chores and activities. Further, as individuals age, there is often a natural tendency to reduce one's living space thus resulting in less need for maintenance and upkeep.

[253] With regard to the therapies of concussion rehab, psych therapy, couples' counselling, and OT with travel, the evidence establishes that these costs are medically necessary and reasonable. Only the couples' counselling is not currently undertaken by the plaintiff but given that he has commenced individual counselling and the relationship with Ms. Hagensen has been impacted by the collision, I would also allow this cost of future care. Similarly, I would allow the one-time costs of neuropsychiatric testing and vocational consulting. Since they are claimed as one-time costs in very reasonable amounts, I would not apply a discount. The total amount of \$10,899 is allowed as a cost of future care.

[254] The plaintiff claims for prescription and over-the-counter medication as well as for cannabis. Although he is not presently taking any prescription medication,

with the neuropsychiatric assessment recommended, he may be prescribed SSRI medication for depression. He presently uses Tylenol for his constant headaches. Those two amounts are allowed with the 60% discount.

[255] With regard to cannabis, there is no evidence from the plaintiff or from a medical professional that cannabis is medically justified or reasonable. The evidence that Mr. Timms uses cannabis is found in Dr. Shew's report, and while I accept that report, it is not the necessary evidence of medical justification. Mr. Timms did not testify to his use of cannabis or reasons for use of cannabis. The claim for this item is therefore disallowed.

[256] Mr. Timms makes a separate claim for his care should he suffer from dementia in the future. He submits:

Dr. Mehdiratta opines that over the "*long-term patients with concussion may have a higher risk of dementia*" (p.13:366-468). Specifically with respect to Mr. Timms, Dr. Mehdiratta opined that "*given [his] symptoms have persisted for over 18 months, the evidence as noted above suggest that point the balance of probabilities his symptoms are permanent. There is also evidence that long-term, patients with concussion have a higher risk of dementia and in this situation given the ongoing symptoms, there is a higher likelihood of this as well*" (p.15: 556-564). Dr. Mehdiratta's report cites peer-reviewed research in support of his statements. Dr. Dommann agreed that patients with mTBI have higher risk of developing dementia. There is a real and substantial possibility that Mr. Timms will develop dementia as a result of the mTBI caused by this MVC.

Mr. Shew provided his opinion on the costs of dementia care – although he could not opine on when these services may be necessary. The plaintiff submits that as a benchmark for the Grauer analysis that using 5 years of Mr. Shew's opinion on the costs for assisted living at the minimum level plus 10 years for long-term care is reasonable:

- Assisted Living – \$1,070.90/month * 60 months = \$64,254
- Long-term Care - \$1,237.20/month *120 months = \$148,464
- Total: \$212,718

[257] The plaintiff submits the same 60% should be used to assess the relative likelihood of this claim and balance out the positive and negative contingencies and the present value. The amount would be \$127,630.80.

[258] With regard to care for dementia, I am of the view that the evidence of Dr. Mehdiratta that Mr. Timms has a higher risk of dementia as a result of his concussion and his ongoing symptoms does not rise to the level of establishing a real and substantial possibility that Mr. Timms will develop dementia. The increased risk on its own is not sufficient given that there are other factors which may also lead to dementia. It is also acknowledged that the plaintiff suffered concussions prior to this collision, and there is no evidence what role if any they would play in assessing the risk from all factors.

[259] In the result, I find that this evidence of risk of dementia does not meet the test of real and substantial possibility, and this claim for future care is dismissed. In other words, the assessment of future care costs entails a consideration of the costs that may reasonably be expected to be required. It is not an award for all expenses that may possibly be incurred.

[260] In the result, the plaintiff is awarded the following amounts for future care:

<u>Item</u>	<u>Amount</u>
• The housekeeping category	\$133,319.70 (at 45%)
• Therapies (one-time cost)	\$10,899.00
• Medications	\$8,523.60 (at 60%)
• Testing and consulting (one-time cost)	\$5,237.50
• Botox and physio	\$27,306.00 (at 60%)
TOTAL:	<u><u>\$185,285.80</u></u>

V. CONCLUSION

[261] Mr. Timms is therefore awarded damages as follows:

<u>Item</u>	<u>Amount</u>
Non-Pecuniary Damages	\$235,000.00
Loss of Housekeeping Capacity	\$35,000.00
Past Income	\$21,000.00 (before tax)
Future Loss of Capacity	\$745,875.00
Future Cost of Care	\$185,285.80
TOTAL:	<u><u>\$1,222,160.80</u></u>

[262] In addition to the awards under the separate heads of damage, I am satisfied that the total award is fair and reasonable on the totality of the evidence.

[263] The parties seek to make further submissions respecting management fees, tax gross-up, court order interest, and costs and disbursements following judgment, and if they are unable to be agreed upon. If such further submissions are sought, they should be made in writing within 45 days of the date of these Reasons with reply submissions 30 days thereafter.

“The Honourable Madam Justice Watchuk”