IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Main v. Gernon,*
2024 BCSC 373

Date: 20240301
Docket: M189692
Registry: Vancouver

Between:

Stuart Main

Plaintiff

And

Ciara June Gernon

Defendant

- and -

Docket: M193822
Registry: Vancouver

Between:

Stuart Main

Plaintiff

And

Michael David Guilbault

Defendant

- and -

Docket: M193829
Registry: Vancouver

Between:

Stuart Main

Plaintiff

And

Dean Michael Salsnek

Defendant

Before: The Honourable Justice Tucker

Reasons for Judgment

Counsel for the Plaintiff: S.N. Collins

Counsel for the Defendants in all actions:	S.J. Kovacs F. Sierecki
Place and Date of Trial:	Vancouver, B.C. April 17-21 and 24-25, 2023
Place and Date of Judgment:	Vancouver, B.C. March 1, 2024

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I. Introduction

[1] The plaintiff, Stuart Main, seeks damages for injuries he sustained as a result of three motor vehicle collisions that occurred on April 30, 2017 ("First Accident"), November 1, 2018 ("Second Accident"), and March 2, 2019 ("Third Accident").

[2] In all three Accidents, the plaintiff was stopped in a vehicle that was rear-ended by another vehicle. Liability has been admitted in all three Accidents.

[3] The First Accident occurred in Surrey, BC on 176th Street. The plaintiff was driving and his wife was in the front passenger seat. While they were stopped in traffic, their car was rear-ended by a vehicle owned and operated by Ciara Gernon. The impact pushed the Mains' car forward into the vehicle in front of them, causing a second impact. The Mains' vehicle sustained significant damage.

[4] In the Second Accident, Mr. Main was stopped on 200th Street in Langley, BC when he was rear-ended by a vehicle owned and operated by Dean Salsnek. It was a relatively minor collision.

[5] In the Third Accident, Mr. Main was once again stopped on Fraser Highway near 160th Street in Surrey, BC, when he was rear-ended by a vehicle owned and operated by Michael Guilbault. It was also a relatively minor accident.

[6] At trial, the plaintiff assert that he sustained a mild traumatic brain injury ("TBI") and myofascial neck injuries in the First Accident, and now suffers significant ongoing cognitive impact, persistent headaches and neck pain in the result. He argues that his headaches and neck pain were aggravated in the Second Accident and again in the Third Accident.

[7] The defendants concede that the evidence points to the plaintiff having sustained a mild TBI in the First Accident. However, they deny that the effects of the TBI are as significant as the plaintiff claims. They argue that the plaintiff had neck pain prior to the First Accident and denied that the Second or Third Accident were aggravating.

[8] The plaintiff testified at trial, as did his wife, a friend, his pastor and several co-workers and managers. The plaintiff also called opinion evidence from five expert witnesses: Dr. Donald Cameron, a neurologist; Dr. Heather Finlayson, a physiatrist; Dr. Kathryn Fung, a psychiatrist; Dr. Manraj Heran, a neuroradiologist; and Christiane Clark, a labour economist.

[9] The defendants conducted extensive cross-examinations, but did not call any lay or expert witnesses of their own.

[10] At the close of trial, the plaintiff sought (along with interest, costs and disbursements) the following:

Non-pecuniary Damages	$ 200,000
Past Loss of Earning Capacity (net)	$ 234,920
Future Loss of Earning Capacity	$ 1,190,000
Loss of Extended Benefits	$ 28,619
Loss of Pension Benefits	$ 350,000
Special Damages	$ 89,938
Cost of Future Care	$ 100,000
Total	**$ 2,193,477**

[11] The defendants say only the following should be awarded:

Non-pecuniary Damages	$ 120,000
Past Loss of Earning Capacity	Nil
Future Loss of Earning Capacity	Nil
Loss of Extended Benefits	Nil
Loss of Pension Benefits	Nil
Special Damages	$ 55,955.59
Cost of Future Care	(Rx)
Total	**$175,955.59+Rx**

II. Background Facts

[12] The evidence on the following points was largely undisputed. I make the following findings.

General

[13] The plaintiff was 46 years old at the time of the First Accident and 51 at the time of trial. He lives with his wife in Langley.

[14] The plaintiff has had psoriatic arthritis since his teens. He has taken medications since it was diagnosed in his twenties. Prior to the Accidents, it was well-managed with medication, but he nevertheless suffered some joint pain and stiffness. His right knee was particularly prone to occasional flare-ups due to arthritis. He had also, for years before the Accidents, suffered occasional episodes of fatigue (associated with his arthritis medications) that caused him to miss a day of work every few months or so.

[15] The plaintiff has had migraines since he was young. In the several years prior to the First Accident, he had had one or two a year. His migraines consistently developed along the sides of his head. They would begin with an aura on the left side, and he would sometime see stars. His migraines generally lasted only a matter of hours and had little impact on his ability to work.

[16] The plaintiff could not recall ever being knocked out or sustaining a head injury that required medical attention prior to the First Accident. He did, however, play a lot of sports from childhood through to his twenties, including hockey and lacrosse.

[17] From 2005 to 2010, the plaintiff experienced a series of difficult personal events. He became depressed and was diagnosed with possible bipolar disorder and started taking a psychiatric medication.

[18] In about 2009, the plaintiff became quite involved with a local church. He felt this greatly improved his mental health. He began attending church services weekly and also started volunteering, doing things like set up for services or school events.

[19] The plaintiff was diagnosed with sleep apnea in 2011 and began using a CPAP machine. He subsequently took up running and became very focussed on fitness. He lost 80 pounds and found he no longer needed the CPAP machine.

[20] At some point, the plaintiff's doctor had him wean himself off his psychiatric medication to try a different one. During this process, the plaintiff found he was able to go without medication and did not resume taking any psychiatric medication again prior to the Accidents.

[21] On June 23, 2016, the plaintiff married his current wife. Decades before their marriage, Mrs. Main had a brain tumor surgically removed. She has some related medical issues, and continues to have a shunt in her skull. She does not drive.

[22] Prior to the First Accident, the plaintiff was running 50 to 100 kilometres a week. He completed the Tough Mudder (an annual 20 kilometre obstacle race) each of the four years preceding the First Accident. He and his wife enjoyed driving, camping, visiting friends and family, and going out to comedy clubs. The plaintiff also enjoyed going target shooting and fishing, which he did regularly with his friend, Erwin Hildebrandt.

[23] In the several years before the First Accident, the plaintiff went to see a registered massage therapist about five times a year for joint aches and stiffness. The massage therapy treatment was primarily focussed on his neck and lower back.

Career

[24] After the plaintiff graduated high school, he enrolled in the business management program at Kwantlen College and then took some courses at the British Columbia Institute of Technology. He earned a chartered professional accountant ("CPA") designation in 2008.

[25] Prior to 2007, the plaintiff worked as an accounting clerk and as a corporate controller.

[26] In 2007, the plaintiff started working at the Canada Revenue Agency (“CRA”) as an income tax auditor. The plaintiff has worked full-time (37.5 hours a week) on a four-day work week schedule throughout his employment at the CRA.

[27] At the CRA, the plaintiff was employed under a collective agreement. The CRA’s workplace organizational structure has various job positions and various classifications. Employees can take career pathways through CRA areas and also move into different positions and higher classifications. Job position openings are generally posted and awarded under job competitions. A job position may be posted as a temporary position (on an “acting” basis) or as a permanent position. The job competitions often include position-specific examinations. Employees can change positions frequently.

[28] The following facts about job positions and classifications are of assistance in understanding the facts. The plaintiff began working in the CRA as an income tax auditor. His original role was classified as an SP5 position (i.e., Service and Special Programs, level 5). He later moved up to an SP6 income tax auditor (indicating a move from level 5 of Service and Special Programs to level 6).

[29] In the audit area, both the AU2 position and AU3 position are senior to an SP6. An AU3 position is very comparable to, but slightly above, an AU2 position, in terms of responsibility and pay level. While the AU3 position can be located in a regional office, an AU3 position reports directly to a manager in Ottawa. An AU2 position, on the other hand, reports up the regional office management chain.

[30] Management positions have a MG prefix, with an MG6 being senior to an MG5 and so on.

[31] In 2010, the plaintiff had the option of continuing as an income tax auditor or moving into the GST/HST Audit Department (“GST Audit”). He selected GST Audit,

becoming an excise tax auditor (SP6) working with the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

[32] In 2013, the plaintiff was able to move from GST Audit to GST Rulings to become an acting technical interpretation officer (SP6). A technical interpretation officer addresses questions arising out of individual cases. The work involves researching precedents, analyzing the *ETA* and writing a ruling letter. GST Rulings operates using a peer review system, under which every ruling letter is reviewed and commented upon by someone other than the author. GST Rulings also operates a phone line to answer GST-related questions arising in other areas. Analysts in GST Rulings take turns manning the line.

[33] The plaintiff stayed in GST Rulings between 2013 and 2015. During that time, he was also able to work as an acting senior technical interpretation analyst (AU2). The senior analysts deal with cases involving multiple issues, which require more research and analysis for ruling letters.

[34] The plaintiff found that he enjoyed GST Rulings and decided to transfer there if and when he could. In 2014, he submitted an application to move to GST Rulings and wrote a related qualification exam.

[35] An employee can only be in an acting position for a given amount of time. In November 2015, the plaintiff was returned to his permanent position (excise tax auditor (SP6) in GST Audit).

[36] The plaintiff's performance reviews prior to the First Accident were positive. The CRA review system has five levels. The plaintiff received "Level 3" (meets expectations) in his performance evaluations. He helped other employees with work. He taught in CRA in-house seminars.

III. Lay Evidence

The Plaintiff

Post-First Accident

[37] The plaintiff and his wife were on the way to church when the First Accident occurred. The police and fire trucks were called, but no ambulance attended.

[38] The plaintiff testified that he felt dazed, confused and agitated at the First Accident scene. About thirty minutes after the First Accident, Mr. Hildebrandt picked the Mains up and drove them all to church. The plaintiff testified that the lights and music at church bothered him and that he got a headache and felt nauseous during the service.

[39] The plaintiff went to work in the week following the First Accident. He testified that driving to work was difficult and once at work, he found it difficult to read and absorb information, felt nauseous and experienced “massive” headaches.

[40] On May 9, 2017, the plaintiff went to see his family doctor, Dr. Brian Carlson. While the plaintiff had no specific recollection of what he said, he testified that he would have reported to Dr. Carlson – on May 9, 2017 and thereafter – that he felt nauseous and “foggy”, was sensitive to light and sound, and was having trouble concentrating.

[41] The plaintiff continued to work in the time following the First Accident, although he testified that he missed some work, either as full days off or by leaving work early and marking it down as sick time.

[42] The plaintiff testified that he has had a headache every day since the First Accident. He described them as quite unlike his migraines. The pain starts up at the very top of his head and then radiates down. These headaches make it difficult for him to focus or concentrate, and this impacts his ability to absorb or retain information.

[43] The plaintiff also testified that he has had neck pain every day since the day after the First Accident. He described the pain as specifically located at the base of his skull, and that while some days are worse than others, the pain is always there. He described his neck pain after the First Accident as unlike the joint pain he would experience in his neck before the First Accident, both in its location and nature.

[44] In June 2017, the plaintiff attended a hospital emergency department as a result of a severe headache, nausea and dizziness.

[45] Around this time, the plaintiff reported to Dr. Carlson that his symptoms were not improving and that trying to work aggravated his symptoms. Dr. Carlson suggested he take time off work to recover. Between July and December 2017, the plaintiff took about four and a half months off from work as leave supported by a medical note from Dr. Carlson.

[46] During the leave, the plaintiff rested a lot and found his symptoms less impactful. He was unable to run due to ongoing nausea. He found it difficult to lift weight above his head. He discovered that being in the cold helped with his headaches and began putting icepacks on the top of his head for relief.

[47] In November 2017, the plaintiff returned to work in GST Audit (SP6) under a graduated return program. In late 2017, the GST Audit manager arranged for him to work in GST Rulings on the basis that the plaintiff was struggling in GST Audit.

[48] Although the plaintiff had done GST Rulings work before, he found it difficult when he returned in 2017. He testified that he had ongoing issues with focus and concentration, headaches, nausea, light and sound sensitivity, “fogginess” and difficulty with word recall. He had the technical knowledge required, but found doing the analysis difficult. He found that doing the work took him much longer than it had in 2015. He was able to work best at the start of the day, but one to three hours in, his cognition would diminish and his output after that was limited. He continued to assume that he would eventually return to his previous capability.

[49] In February 2018, the Team Leader in GST Rulings, Rayment Ng, had an informal meeting with the plaintiff to discuss his low productivity. The plaintiff told Mr. Ng about his medical issues.

[50] While the plaintiff was in GST Rulings, he was awarded a one year acting AU2 position in GST Rulings effective July 9, 2018. The position was granted to him under the application he had filed in 2014 (and his related 2014 examination score). As it was an acting AU2 position, his permanent position remained his SP6 position.

[51] Later in 2018, the plaintiff successfully applied to participate in a management program known as the “Aspiring MGs” program. Selection for the program is based on the results of a program examination, past work performance and voluntary contributions. The plaintiff was given a medical accommodation to write the program examination. He had unlimited writing time, while other writers had 20 minutes.

[52] The Aspiring MGs program was explained by another witness, Owen James. It is directed at employees who aspire to move into the management position immediately above them. The main benefit is that the program’s participants are expected to be given, ideally within a year of entering the program, an opportunity to work in that management position in an acting capacity. The idea is that the temporary work experience will be an advantage in any subsequent job competition for the position.

[53] The plaintiff testified that there had been no real improvement in his symptoms following the First Accident.

Post-Second Accident

[54] In November 2018, the Second Accident occurred.

[55] The plaintiff testified that the Second Accident aggravated his ongoing symptoms from the First Accident, including his nausea, dizziness and fatigue, and the aggravation made him even less productive.

[56] Mr. Ng selected the plaintiff to act a Team Leader (MG5) from February 4-15, 2019, while Mr. Ng was away from his position. The plaintiff struggled in this role and only closed two cases (the expectation is 7 to 10, along with administrative work).

[57] The plaintiff's work issues continued. He testified that he would be able to perform for the first hour he was at work, but then his focus, memory, and concentration would wane.

[58] He continued to discuss his symptoms and challenges with Mr. Ng. In these discussions, both the plaintiff and Mr. Ng continued to hope that the plaintiff's symptoms would abate.

Post-Third Accident

[59] The Third Accident took place in March 2019. The plaintiff testified that the nature and impact of the Third Accident was like that of the Second. It aggravated his ongoing symptoms, in particular, his headache, irritability, frustration, "fogginess" and word recall, and he felt his productivity was impacted by the aggravation.

[60] In July 2019, Mr. Ng was told to reduce the number of acting AU2s in GST Rulings from four down to two, due to budget cuts. Mr. Ng chose to move the plaintiff back to his SP6 position.

[61] Dr. Carlson referred the plaintiff to Dr. Cameron, a neurologist. Dr. Cameron conducted his first assessment of the plaintiff on April 28, 2019. Dr. Cameron did further assessments on August 7, 2019, February 3, 2020 and September 23, 2020. Following the February 2020 assessment, Dr. Cameron ordered an MRI brain scan for the plaintiff. The results were normal for the plaintiff's age. (As Dr. Cameron testified, TBI damage is microscopic and as such would not show on an MRI.)

[62] The plaintiff testified that in early 2020 he was trying hard at his work, but just could not function at the rate he could before. Asked to compare his productivity to that of others in GST Rulings, the plaintiff placed himself at the "average or lower

end". He said his productivity rate was "probably comparable to some people who used to work there".

[63] In early 2020, the plaintiff, in consultation with Dr. Carlson, Dr. Cameron and Mr. Ng, again went off work. The plaintiff obtained two medical notes from Dr. Carlson, one dated March 3, 2020 and then a second one dated April 15, 2020. The plaintiff did not submit the first note to work, given that the pandemic had just commenced, and the plaintiff was waiting to see how the CRA would respond to it. He did submit the second note, which indicated that he needed to be off work for medical reasons through to August 31, 2020. The plaintiff stopped working in the third week of April 2020.

[64] After the plaintiff stopped working, he began to experience occasional numbness in his face, left hand and left leg ("numbness symptoms"). The numbness symptoms were not painful, did not cause functional impairment and were relatively infrequent (occurred about three to four times a year).

[65] In July 2020, the plaintiff reported the numbness symptoms to Dr. Cameron. Dr. Cameron ordered a second MRI brain scan, which revealed multiple lesions indicating demyelination, a result that could be indicative of multiple sclerosis. Medical research disclosed that demyelination was also a very rare, but recognized, side-effect of one of the plaintiff's arthritis medications (Remicade/Infliximab). Dr. Cameron advised the plaintiff's rheumatologist, Dr. Kenneth Blocka, of the demyelination. Dr. Blocka had the plaintiff wean off Remicade and move to another medication.

[66] Dr. Cameron eventually referred the plaintiff to two different neurologists with expertise in multiple sclerosis. The plaintiff saw the first in September 2020 and the second in January 2022. Neither considered multiple sclerosis the likely cause of the demyelination. The second neurologist opined that the plaintiff's arthritis medications were the probable cause.

[67] On July 30, 2020, the plaintiff's insurer granted his application for long term disability benefits on the basis that he was disabled from his "regular employment". The benefits were granted effective June 15, 2020. Once the benefits were granted, the plaintiff moved to indefinite disability leave from his CRA employment.

[68] Dr. Cameron reassessed the plaintiff again on September 23, 2020, December 1, 2020, January 21, 2021, April 8, 2021, July 7, 2020, June 15, 2021, September 15, 2021, November 17, 2021 and May 9, 2022.

[69] In the spring of 2022, notwithstanding that the plaintiff was off on disability leave, the CRA offered him (and he accepted) a permanent AU2 position.

[70] On April 13, 2022, the plaintiff's disability insurer advised him that a further adjudication had been made and that his long-term disability benefits would be continued indefinitely on an disabled from work at "any occupation" basis.

[71] The plaintiff, following a series of discussions with, among others, Mr. Ng and Mr. James, decided to apply for early retirement on a medical basis.

[72] On May 18, 2022, the plaintiff obtained approval from his pension administrator to retire early on medical grounds. He retired from the CRA effective November 1, 2022.

[73] Following the Accidents, the plaintiff resumed using his CPAP machine once for a period in 2020 and then again in 2022. He testified that he did not notice any improvement in his cognitive or fatigue symptoms as a result.

[74] After he stopped working, the plaintiff did some volunteer work for the Cloverdale Community Kitchen. For a period of two weeks, he worked three to four hours a week entering data into spreadsheets. He was able to determine for himself which hours to work. He found that unless he spread the hours out, the work aggravated his symptoms.

[75] The plaintiff continues to do his share of the household chores that he did prior to the First Accident, but paces himself and spreads them out over multiple days.

[76] The plaintiff gave testimony about the impact of the Accidents on his social and marital relationships and his church and recreational activities. Overall, he testified that he is frustrated by his symptoms and that he misses his work and doing things with friends and family. His testimony on these matters was generally consistent with the evidence given by the lay witnesses (summarized below).

Lana Main, spouse

[77] Mrs. Main met the plaintiff in 2013 and they married in July 2016.

[78] Mrs. Main testified that prior the First Accident, they enjoyed going on long drives together, camping, going on Costco outings, and visiting friends and family at their homes. The plaintiff was very fit. In her view, his most significant physical problem prior to the First Accident was his right knee, which bothered him from running. She had not known him to have any cognitive, memory or mood issues. He loved his job and she testified that he would talk about it to her often and at length without any encouragement.

[79] Mrs. Main was in the vehicle during the First Accident. She said it was a significant jolt and that her shunt (from her earlier brain surgery) was twisted in the impact and that her neck was hurt. She was unable to recall much about the plaintiff on the day of the First Accident or the day after, as she was focussed on her own injuries. However, in the days after that, she observed that he was irritable, wanted the lights off, and wanted it to be quiet. He refused to go places with her where it might be noisy.

[80] In the days and weeks following the First Accident, Mrs. Main testified that the plaintiff complained of headaches all the time, was grouchy and talked very little. He began wearing sunglasses all the time. The plaintiff tried to attend church services

with her, but found it too noisy, so he began driving her to the church and then waiting out in the car by himself, listening to recorded services.

[81] In the months following, she noted that the plaintiff had trouble finding words, describing him as simply stopping mid-conversation in order to focus on whatever word he had been unable to recall. He wanted to stay home where it was quiet. He would drive her and drop her off to visit friends and family, but would refuse to come in. Mrs. Main said that she had worn slippers in the house every day since they married, but that after the Accident, the plaintiff said he could not bear the noise of them on the floor and so she had to stop wearing slippers.

[82] Mrs. Main testified that their sex life has been negatively impacted by the plaintiff's headaches. They rarely go out anywhere anymore and, if they do, there is always a concern about noise and a need to ask people to turn the lights down. When they flew to visit Mrs. Main's sister in the Cayman Islands, the plaintiff had a "dreadful" headache from the air pressure in the plane. He is scared to fly again. Although her other sister is in the Lower Mainland, the plaintiff will not go with her to visit because she has a baby and the plaintiff cannot handle the noise.

[83] Mrs. Main and the plaintiff attempted to go camping once, but the plaintiff had a horrible headache before the tent was up. They used to enjoy just going out driving, but now they cannot play music, the air settings have to be just right and they have to bring icepacks and make frequent stops. In the result, they no longer drive outside their neighbourhood without good cause. The plaintiff drives her to Costco, but then waits in the parking lot because the store is too noisy. He will go inside quieter retail spaces with her.

[84] Mrs. Main did not notice any improvement in the plaintiff's symptoms following the First Accident, nor any change for the worse after the Second and Third Accidents.

Kevin Snyder, pastor

[85] Mr. Snyder is the lead pastor at the plaintiff's church. He has known the plaintiff since November 2011. Prior to 2017, Mr. Snyder was the youth pastor and saw the plaintiff about once a week. He became the lead pastor in 2017, and since then he sees the plaintiff about two to three times a week.

[86] Mr. Snyder described the plaintiff before the First Accident as very engaged with the church, very extroverted, healthy, fit and someone who loved to talk about his job and running. He noted no issues with the plaintiff's memory, focus or concentration at this time.

[87] After the First Accident, Mr. Snyder saw the plaintiff trying to sit at the very back of the church with sunglasses on, but noted that he would get agitated and leave if the service or children got noisy. Mr. Snyder testified that when he met personally with the plaintiff, the plaintiff could meet for 30 to 90 minutes, but would begin grimacing about 20 to 30 minutes in. In the meetings, he felt the plaintiff was struggling cognitively.

[88] Eventually, primarily to accommodate the plaintiff's sensitivity to noise and sound (although it also benefits some other church members with sensitivities), Mr. Snyder began having an "accessible" Sunday service once a month. At the accessible service, the only music is an acoustic guitar and the ceremony itself is much quieter. The plaintiff is able to attend the accessible services in person.

[89] Mr. Snyder also set up regular Thursday meetings with the plaintiff. One other member of the church attends the meetings so there can be a group discussion. Mr. Snyder provides the two attendees with a preview of his upcoming Sunday sermon and they then discuss the subject together for an hour or so. Mr. Snyder came up with these meetings to provide a way for the plaintiff to stay engaged with the sermons he cannot attend in person.

[90] Mr. Snyder did not notice any significant change in the plaintiff's symptoms following the Second and Third Accidents, nor any improvement following the First

Accident. When asked if he saw any change in the plaintiff's symptoms after the plaintiff was told that he might have multiple sclerosis, Mr. Snyder thought this was possibly the case and indicated that the plaintiff was very worried about potentially having multiple sclerosis.

Erwin Hildebrandt, friend

[91] Mr. Hildebrandt is a technical supervisor in a municipal building department. He has been friends with the plaintiff since 2009. He said that he and the plaintiff are both "regulatory guys" who enjoy talking about their work. He described the plaintiff as a "sharp guy" who seemed very enthusiastic about his job.

[92] Mr. Hildebrandt said the plaintiff complained of achy joints "every now and then" prior to the First Accident. He could not recall the plaintiff complaining about joint pain specific to his neck prior to the First Accident.

[93] Mr. Hildebrandt could not recall much from the day of the First Accident, beyond the fact that the plaintiff had been upset and agitated when he picked him and Mrs. Main up at the scene. He said that in the days following the First Accident, the plaintiff complained to him that his headache from the First Accident would not go away, and that the plaintiff continually reported having a headache thereafter.

[94] Mr. Hildebrandt said that it was "fairly soon" after the First Accident that the plaintiff began wearing sunglasses and having issues with light. He observed that the plaintiff would struggle when trying to speak. He recalled the plaintiff saying that he found it difficult to focus at work and being frustrated about not being able to keep up with the pace at work. He described the plaintiff's inability to work as seemingly interfering with his sense of self.

[95] Mr. Hildebrandt sees the plaintiff twice a week at a minimum – once at church and once as part of a Thursday night church coffee group. The Thursday meetings are hosted by Mr. Hildebrandt and consist of three to four men talking for a few hours. The plaintiff still attends the Thursday night meetings, but Mr. Hildebrandt dims the lights for him to come over.

[96] Mr. Hildebrandt owns a boat and has access to a family cottage in the interior of the province. Before the First Accident, he and the plaintiff would go fishing every month during the season, often taking weekend trips up to lakes in the interior. They would also go target shooting together twice every month.

[97] Since the Accidents, Mr. Hildebrandt and the plaintiff still fish together at least as often as they did before, possibly more as the plaintiff enjoys the quiet out on the boat. The only difference now is where they go fishing. After the Accidents, they stick to local lakes, so it can be a half-day's outing and so there is less travel time for the plaintiff. They still go target shooting at the range, but only about twice a year. They belong to a small outdoor club, and usually go when they have the range to themselves. They use full hearing protection equipment, and also now use 22 calibre handguns, which Mr. Hildebrandt described as less loud. They generally leave the range if other people are there or arrive, and usually shoot for only an hour.

[98] In Mr. Hildebrandt's view, the plaintiff's symptoms did not improve after the First Accident, but the plaintiff improved his coping skills and his ability to deal with the symptoms. Mr. Hildebrandt did not notice any new issues following the Second and Third Accidents.

Richard Tung, CRA

[99] Mr. Tung was a senior technical interpretation analyst in GST Rulings (AU2) when he retired from the CRA in April 2021.

[100] Mr. Tung and the plaintiff worked together in GST Rulings from 2013 to 2015. Although they were not on the same team, Mr. Tung observed that the plaintiff enjoyed the work and appeared to have no difficulty doing it. He observed no issues with the plaintiff's memory or concentration during this period.

[101] When the plaintiff returned to GST Rulings in 2017, Mr. Tung observed that the plaintiff took breaks, complained of headaches, wore sunglasses and had issues with the office lights. He thought the plaintiff's speech was slurred and that he appeared frustrated and to be struggling with the work. He and the plaintiff had a

discussion in early 2018 about how the plaintiff was unable to keep up with his caseload. He noticed that the plaintiff would get into disputes with callers when he manned the phone. He described the plaintiff as “trying hard, but spinning his wheels”.

Mohan Grewal, CRA

[102] Mr. Grewal worked at the CRA for 33 years. In September 2022, he retired as a Team Leader (MG5) in GST Rulings, a position he obtained in 2020. Prior to 2020, he worked as a senior technical interpretation analyst (AU2) in GST Rulings for 20 years (at a variety of locations).

[103] Mr. Grewal said he met the plaintiff when they both were in GST Rulings “around 2016”. Given that the plaintiff returned to GST Audit in November 2015, that estimate seems slightly off and it was likely 2015. Mr. Grewal has done of lot of peer review as an AU2. He found the plaintiff’s 2015 letters to be very well done and would make only minor suggestions when he reviewed them. He considered the plaintiff to be very conscientious, have a solid knowledge base from his time in GST Audit and to be unusually interested in doing his work well. Mr. Grewal did not observe the plaintiff to have any difficulty doing the work and described the plaintiff as appearing “quite happy at his desk”. In Mr. Grewal’s view, the plaintiff had the aptitude to do well in GST Rulings.

[104] On the plaintiff’s return to GST Rulings in 2017, Mr. Grewal noted he found the work tiring and was unable to work a full day. He described the plaintiff’s concentration as quickly “evaporating”. The plaintiff appeared to find manning the phone line difficult and tiring, which had not been the case in 2015. When peer reviewing the plaintiff’s work, he found that his work quality had gone downhill. He had problems describing client businesses and some of his letters needed to be revised. He said that while the plaintiff’s letters were “generally on the right track”, they would need to be restructured. He described the plaintiff’s letters as sometimes better than average, but also sometimes below average. He felt that the plaintiff still had solid technical knowledge, but seemed unable to apply it.

Denis Mazerolle, CRA

[105] Mr. Mazerolle joined the CRA as an SP6 in GST Rulings in November 2013. After that, he was an acting AU2 for a while, and he then moved in to an AU3 position in July 2018. Mr. Mazerolle met the plaintiff in GST Rulings when he worked there from 2013 to 2015.

[106] Mr. Mazerolle said that in 2013 through to 2015, the plaintiff's work product was very knowledgeable and thorough, and that it took little of his time to peer review the plaintiff's letters.

[107] When the plaintiff returned to GST Rulings in 2017, Mr. Mazerolle found the plaintiff to be "quite a different person". He noted that the plaintiff frequently had a pained expression. The plaintiff complained about head pain, squinted a lot, wore sunglasses all the time and appeared to have trouble concentrating.

[108] On peer review, he found the plaintiff's work product was not as it was in 2015 – his letters were out of sequence, less thorough, short on supporting information and cluttered with irrelevant facts. He found it necessary to suggest the letters be restructured. He sometimes had to explain the problem with the letter to the plaintiff more than once. On review, he consistently found aspects of the plaintiff's letters to be incorrect and stated that reviewing the plaintiff's letters took four to six times longer than it did in 2015. By the time the plaintiff's letter went out, Mr. Mazerolle often felt it was more his own work product than the plaintiff's.

[109] Mr. Mazerolle also noted that the plaintiff struggled to provide quick answers (which is the expectation) when manning the phone line and that the plaintiff would often have to call the person back after getting additional information.

[110] Mr. Mazerolle said he personally knew of at least two (and possibly three) AU3 postings that the plaintiff had applied for after he came back in 2017. He said that when the plaintiff spoke with him about the AU3 job competition examinations he had written, he could see that the plaintiff had made errors.

Raymond Ng, CRA

[111] Mr. Ng has been with the CRA since 1991. From 2008 through to April 2021, he was a Team Leader (MG5) in GST Rulings. From April 2021 to April 2023, he was a special assignment officer (MG6) in GST Rulings. Since April 2023, he has been the acting manager of program services (MG6) for GST Rulings.

[112] Mr. Ng met the plaintiff in GST Rulings when he worked there from 2013 to 2015. The plaintiff did not report directly to Mr. Ng, but Mr. Ng knew him by reputation as an “exceptional” officer who left “no stone unturned” and really enjoyed the work. He observed no cognitive difficulties. Based on his 2015 work, Mr. Ng thought the plaintiff had the capability to be an AU2 and the potential to be an MG5 in GST Rulings.

[113] Mr. Ng said he was approached by a GST Audit manager in 2017 about whether there might be a spot for the plaintiff in GST Rulings, as the plaintiff was having challenges in Audit following a car accident. Mr. Ng said he assumed that the issue was simply that GST Audit requires travel and that he “jumped at the chance” to get the plaintiff back into GST Rulings. However, when the plaintiff started, Mr. Ng discovered that he was “just not the same person” as before, and noticed performance issues in terms of focus, concentration, stamina and attention to detail.

[114] Initially, Mr. Ng thought the plaintiff was able to do the rulings work, but then discovered that a disproportionate amount of peer review time was being invested into his letters. In February 2018, he met informally with the plaintiff to discuss his low production numbers. At that meeting, the plaintiff explained his medical challenges and Mr. Ng adopted a supportive approach.

[115] Mr. Ng selected the plaintiff to act as MG5 Team Leader in his absence in 2019, but testified that the plaintiff did poorly. Mr. Ng said the plaintiff was the only acting MG5 who had ever left him a backlog of work to clear.

[116] Mr. Ng peer reviewed some of the plaintiff’s work himself. He said he was able to spot issues that the plaintiff had clearly failed to consider.

[117] Mr. Ng had a series of further discussions with the plaintiff about his work performance. Mr. Ng said he approached it gently with the plaintiff. He testified that he initially explored whether there were any other CRA positions the plaintiff could do (including part-time positions). He said the CRA had nothing suitable for someone whose challenge was concentration and who could only work a short time without needing a break. Mr. Ng eventually led the conversations towards suggesting that the plaintiff consider applying for medical retirement.

[118] Mr. Ng confirmed that following their February 2018 discussion (in which the plaintiff first disclosed to his medical issues to Mr. Ng), he applied an adjusted performance standard when conducting the plaintiff's performance reviews to reflect a medical accommodation. He said that absent an adjusted performance standard, he would have been obliged to give the plaintiff a Level 1 (the lowest of the five levels) rating.

[119] Mr. Ng confirmed that he never told the plaintiff that his employment was in jeopardy due to poor work performance.

[120] Mr. Ng confirmed that when the 2019 budget cuts came, he opted to remove the plaintiff from his acting AU2 position because of the plaintiff's poor work performance. He said that if the plaintiff had been working at his 2015 performance level, he would have been a top choice to continue on as an acting AU2.

Owen James, CRA

[121] Mr. James is one of two regional managers (MG6) of Excise Duty and Taxes in the Legislative Policy and Regulatory Affairs division. His role includes human resource management for those reporting up to him.

[122] Mr. James explained that the plaintiff was offered a permanent AU2 position in November 2021, even though he was on disability leave at that time, because the CRA takes the view that should a person recover while on disability leave, they are entitled to return to the position they would otherwise have been at.

[123] Mr. James testified that CRA Human Resources uses “two years’ leave without any meaningful gain in ability” as a benchmark for evaluating a person’s employment status. As the plaintiff approached the two-year mark, Mr. James became involved in the matter. Mr. James had discussions with the plaintiff, the disability insurer and people in the human resources department, and then determined that the plaintiff should be encouraged to apply for medical retirement.

[124] Mr. James testified that a mock GST Rulings case file was made up for the plaintiff in April 2022. He said the mock-up was done at the plaintiff’s own request, not for CRA purposes.

[125] Mr. James confirmed that Mr. Ng did the plaintiff’s performance reviews appropriately. For privacy reasons, the performance review form itself should not indicate that an adjusted performance scale has been applied due to a medical accommodation. The existence of the medical accommodation is confidential information.

IV. Expert Evidence

Dr. Donald Cameron, treating neurologist

[126] Dr. Cameron is the plaintiff’s treating neurologist. He is an Assistant Professor of Neurology at the University of British Columbia (“UBC”) and a member (and former head) of the Division of Neurology, Department of Medicine at Lions Gate Hospital. He maintains a private practice doing independent neurological assessments, including a TBI practice.

[127] Dr. Cameron has been treating the plaintiff since July 2019, by referral from Dr. Carlson. He has assessed the plaintiff over 15 times. He provided an expert report dated December 4, 2022.

[128] On cross-examination, Dr. Cameron testified that he has handwritten notes relating to his report. Counsel for the defendant commented that the handwritten notes had not been produced as part of the expert file disclosure. Dr. Cameron responded that his assistant may not have thought to check for handwritten notes.

The matter was not explored further and cross-examination continued. Counsel for the defendant did not seek either an adjournment or an order for production of the handwritten notes. In the circumstances, I draw no inferences from the failure to produce the handwritten notes.

[129] In Dr. Cameron's opinion, the plaintiff suffered a mild TBI from the First Accident and developed symptoms of post-traumatic brain injury syndrome or post-concussion syndrome ("PCS") as a result. He testified that no specific symptom or combination is required to manifest in order to make a diagnosis of PCS. Rather, a diagnosis is made based on the presence of a significant number of symptoms from the associated symptom cluster. In the plaintiff's case, the relevant resulting symptoms include headaches, dizziness, fatigue, feeling overwhelmed, disturbed sleep pattern, irritability, mood swings, anger outbursts, decreased ability to socialize, decreased ability to tolerate stress, decreased memory and decreased concentration. Further, Dr. Cameron testified that a mild TBI does not translate to mild PCS. The correspondence is not predictable.

[130] The plaintiff reported to Dr. Cameron that he suffered increased headaches and pain after the Second Accident, as well as an exacerbation of his ongoing cognitive problems.

[131] Dr. Cameron opined that the plaintiff probably suffered only soft tissue and musculoskeletal injuries in the Second Accident (i.e., no further TBI). He expressed the same opinion about, and the same reporting by the plaintiff in respect of, the Third Accident.

[132] Dr. Cameron explained that for patients who suffer a TBI and then suffer a subsequent soft tissue injury, the added pain can aggravate existing problems with cognition and attention span still persisting from the TBI. Dr. Cameron testified that he believed the Second and Third Accidents probably had this effect on the plaintiff.

[133] Dr. Cameron said that in his assessments over the years, the plaintiff consistently reported ongoing cognitive problems without resolution following the

First Accident, and also chronic pain, discomfort and post-traumatic headaches as a result of the soft tissue and musculature injuries sustained in the three Accidents. With regard to the plaintiff's headaches, he wrote in his report:

> 56. Mr. Main is describing probable initial post-traumatic headaches resultant from the mild traumatic brain injury with intermixed post-traumatic musculoskeletal or cervicogenic headaches and post-traumatic common migraine headaches following the first accident. It is probably that the more recent chronic recurrent headaches are predominantly post-traumatic musculoskeletal or cervicogenic headaches with intermixed post-traumatic common migraine headaches. It is probably that the musculoskeletal or cervicogenic headaches were exacerbated as a result of the soft tissue and musculoskeletal injuries in the form of a type 2 whiplash injuries that he sustained at the time of the second and third accidents on November 1, 2018 and March 2, 2019.
>
> 57. ... In my opinion, it is probably that the long-term cognitive problems are residual to the mild traumatic brain injury that he sustained at the time of the accident and contributed by the chronic pain that he has developed following these three accidents.

[134] Later in his report, Dr. Cameron wrote that in his opinion the residual adverse effects of the three Accidents, particularly the cognitive problems, were the main contributing factors for the plaintiff's inability to sustain full-time work for the CRA, for being deemed "permanently competitively unemployable" and for his medical retirement.

[135] With respect to the plaintiff's July 2020 report of numbness and the lesions (or demyelination) discovered on the plaintiff's second brain MRI, Dr. Cameron stated:

> 62. I have followed Mr. Main for over two years since the onset of these symptoms, and he still reports suffering with ongoing sensory complaints and a subjective weakness involving predominantly the left upper extremity and left face and head area. There is also some evidence in the neurological literature that patients may have cognitive problems due to the demyelination in the white matter of the brain as a complication of this TNF alpha blocker medication. Mr. Main did not report to me that he was suffering with increased cognitive problems associated with the new-onset sensory complaints in late 2019 or early 2020. He has reported consistently ongoing cognitive complaints present since the mild traumatic brain injury that he sustained at the time of the accident on April 30, 2017, but that there was no deterioration or worsening of these cognitive symptoms, at a later date, associated with the other central nervous system symptoms, which in my opinion are due to the Remicade medication. …

[136] Dr. Cameron testified that the plaintiff thought the demyelination shown on the second brain MRI was affecting his cognitive function, and that the plaintiff was upset about that possibility, but that Dr. Cameron himself did not see any association. However, the plaintiff was very concerned about potentially having multiple sclerosis. Dr. Cameron said that some patients have an emotional reaction to this potential diagnosis, which he described as "MS panic". The MS panic can itself be a temporary interference with cognitive function.

[137] In cross-examination, Dr. Cameron was taken to the January 27, 2022 letter ("Pension Letter") he wrote in relation to the plaintiff's pension application for medical retirement. It is a very short letter, comprising four brief paragraphs. It includes the following:

> I have assessed Mr. Stuart Main in neurological consultation during the last several years. Mr. Main has suffered with psoriatic arthritis. He had been placed on an immunosuppressive (immunomodulating medication) Infliximab. This was discontinued in July 2020 because Mr. Main developed neurological symptoms including cognitive dysfunction, and the MRI brain scans documented changes within the white matter of his brain. In my opinion, he does not suffer with multiple sclerosis. The change or deterioration in his neurological function and the white matter lesions are probably an adverse effect of the immunomodulating medication, Infliximab, that he had been taking for his psoriatic arthritis. This is a known adverse effect of this medication.
>
> Mr. Main also has suffered a mild traumatic brain injury (concussion) at the time of a motor vehicle accident on April 30, 2017. These symptoms were exacerbated or aggravated as a result of two subsequent motor vehicle accidents in November 2018 and March 2019. As a result of these combined neurological injuries including the adverse effects of the medications, Mr. Main has ongoing cognitive problems. …
>
> [Emphasis added.]

[138] The defendants submit that the Pension Letter plainly states that the effects of Remicade (generically, Inflixmab) included cognitive dysfunction. They say the Pension Letter is inconsistent with Dr. Cameron's report and testimony in this proceeding.

[139] Counsel for the defendants make the same point in respect of an Occupational Health Assessment Form ("Health Form") Dr. Cameron completed for

Health Canada on February 16, 2022. The Health Form is extremely brief. Dr. Cameron has inserted some handwritten comments in two small boxes. The defendants say his comments on the Health Form also suggest the lesions are a cause of cognitive dysfunction.

[140] In his testimony, Dr. Cameron explained that the Pension Letter refers to the lesions as a neurological injury, and to the plaintiff's emotional response (MS panic) to the lesions and their potential diagnostic meaning as a resulting cognitive symptom. Dr. Cameron conceded that the Pension Letter does not expressly identify emotional response as a factor. Dr. Cameron gave the same explanation with regard to his handwritten comments on the Health Canada form.

[141] On cross-examination, Dr. Cameron expressed the view that a neuropsychological assessment would not be of assistance in this case.

Dr. Heather Finlayson, physiatrist

[142] Dr. Finlayson is a qualified and registered specialist in Physical Medicine and Rehabilitation ("PM&R"). She also has a subspecialty certification in Electromyography from the Canadian Society of Clinical Neurophysiologists. She is a staff physician for the GF Strong Rehab Center's Neuromusculoskeletal Rehabilitation Program, a PM&R consultant at Vancouver General Hospital, a clinical associate professor with UBC and a member of the UBC Division of PM&R.

[143] Dr. Finlayson assessed the plaintiff on September 15, 2022. Her report was written that same day.

[144] Dr. Finlayson opined that the plaintiff suffered a mild TBI in the First Accident. She noted that a subset of people with TBIs develop persistent symptoms that may include prolonged or permanent headaches, cognitive dysfunction and changes in mood and/or personality. People are more vulnerable to developing these prolonged symptoms if they have: (1) a history of mild TBIs or concussions; (2) a history of psychiatric disorders; or (3) pre-existing headache disorders. Dr. Finlayson observed that the plaintiff had all three increased vulnerability factors. With respect to the first

vulnerability factor, she described the plaintiff as having been “knocked out” as a child playing sports.

[145] Dr. Finlayson testified that in her opinion, the primary leading cause of the plaintiff’s persistent symptoms of headaches and cognitive dysfunction is the mild TBI he sustained in the First Accident. However, she opined that the psychological stress and pain caused by the subsequent Accidents probably contributed to his symptoms as well. In her view, there is no clear correlation between the lesions on the plaintiff’s second MRI and any specific neurological symptoms.

[146] In Dr. Finlayson’s opinion, the plaintiff’s current headaches differ from his pre-Accident headaches and should be classified as “persistent headaches attributed to whiplash” and caused by the Accidents. She describes the TBI itself as a whiplash-related injury. As I read her report, it indicates that the plaintiff’s headaches are predominately caused by the TBI itself. She notes that the plaintiff’s headaches are not associated with the severity of his neck pain.

[147] Dr. Finlayson concluded that the plaintiff probably has myofascial neck pain resulting from the Accidents, which she described as pain originating in the muscles, tendons and other soft tissue and, in the plaintiff’s case, affecting both sides. In concluding that the plaintiff sustained a myofascial neck injury, she specifically relied on the fact that plaintiff “had no history of severe, frequent or persistent neck pain” in the years prior to the Accidents.

[148] On cross examination, Dr. Finlayson was taken to a report in which Dr. Blocka states, under the heading “rheumatological diagnosis”, “chronic neck pain presumably due to cervical spondylosis”. She agreed that Dr. Blocka’s report indicates pre-existing neck pain. Dr. Finlayson noted that she could not tell from Dr. Blocka’s report did not indicate where or what level the neck pain was. She agreed that if she knew more about the pre-existing neck pain (in terms of area, intensity and relief), that information might cause her to change her opinion regarding the myofascial neck injury. However, with regard to her knowledge about neck pain and psoriatic arthritis, she stated that she understood Dr. Blocka to be describing diffuse

joint pain, as opposed to focalized neck pain. She stated that the plaintiff's current neck pain is not the usual presentation for neck pain due to psoriatic arthritis.

[149] In Dr. Finlayson's view, the plaintiff has probably already reached maximal medical improvement. She opined that the plaintiff is probably permanent disabled from working as an accountant as a result of his injuries from the Accidents. Dr. Finlayson noted that the plaintiff found it impossible to perform his prior job, which required strict attention to detail and the processing of complex information. On cross-examination, Dr. Finlayson was shown the plaintiff's CRA work performance reviews and asked if she was aware that the plaintiff had been meeting his job expectations. She said she was not aware until reading the reviews.

[150] In her view, the plaintiff would probably be able to return to some limited running, although it might aggravate his headaches. She commented that he should avoid the use of firearms and going to the shooting range.

[151] Dr. Finlayson made three recommendations to manage the plaintiff's ongoing symptoms: a neuropsychological assessment, headache management including trying different medications and massage therapy once or twice a month indefinitely for the temporary reduction of myofascial pain.

[152] Her recommendation for neuropsychological assessment reads:

> I recommend that he have a complete neuropsychological assessment to assess the specific areas of cognitive dysfunction and mood dysfunction and their relative impacts on his symptoms and performance. The results can help to guide further therapies.

Dr. Kathryn Fung, psychiatrist

[153] Dr. Fung assessed the plaintiff on July 22, 2022 and provided a report dated January 12, 2023. She primarily opined on whether the plaintiff suffered psychological injuries from the Accidents and whether psychiatric issues were causing or contributing to his cognitive symptoms.

[154] Dr. Fung assessed the plaintiff's mood as occasionally frustrated and irritable, but not depressed. In her opinion, he does not suffer from any psychiatric disorder.

[155] On assessment, she noted that the plaintiff displayed some word-finding difficulties. She conducted a Montreal Cognitive Assessment ("MoCA") during her assessment. The plaintiff scored 24 out of 30. A score of 26 and greater is considered normal on the MoCA. The plaintiff lost points on the MoCA for language, abstraction, and delayed recall.

[156] In Dr. Fung's opinion, the assumed facts and the abnormal MoCA score, in the absence of any other significant psychiatric symptoms, made it unlikely that the plaintiff's cognitive complaints are due to an untreated psychiatric condition. She stated in her report:

> … No standardized neuropsychological testing has been done. It is preferable to have a standardized neuropsychological assessment to confirm that there is a modest impairment in cognitive performance. The MoCA is only a screening tool, but in combination with the assumed facts, it is probable that Mr. Main's persistent cognitive difficulties are due to Mild Neurocognitive Disorder Due to Traumatic Brain Injury.

[157] Dr. Fung diagnosed the plaintiff with Neurocognitive Disorder Due to Traumatic Brain Injury. She opined that this diagnosis was more likely than not caused by the Accidents, and that the First Accident was the primary cause. She concluded that the plaintiff was permanently partially disabled from performing his usual home and recreational activities due to symptoms such as fatigability, decreased concentration and distractibility/ sensitivity to light and sound, limiting his ability to go to busy environments and read. In her view, his cognitive function has plateaued.

[158] With respect to employment, Dr. Fung concluded:

> With a diagnosis of Mild Neurocognitive Disorder Due to Traumatic Brain Injury and the assumed facts about his difficulties at work, it is my opinion that Mr. Main is probably permanently disabled from returning to his pre-MVA position at the CRA, or to a similar which he has the education and qualifications. ...

> With this diagnosis, Mr. Main may possibly be able to volunteer or return to work in a part-time position that does not require much executive thinking, although I believe it is unlikely. With his short-term memory and attention difficulties, he would require a supportive employer and a role where the tasks are routine and predictable so the work can become part of his long-term memory.

[159] When asked to elaborate on plateaued concussion recovery, Dr. Fung said that while some people will continue to "wax and wane within a range", she would not expect someone who had plateaued to then either decrease or increase suddenly (absent a further injury).

[160] Dr. Fung had not been provided with the plaintiff's CRA performance reviews for her report. On reviewing them, she said she found the plaintiff's performance reviews following the First Accident surprising. She said that if she had seen them during her review, she would have asked the plaintiff more questions directed at exploring his ability to evaluate his own cognition level accurately, as it is not uncommon for patients to be unable to do so.

[161] When asked about the period of delay between a TBI and the onset of PCS symptoms, Dr. Fung said that there should be a temporal connection, but that developing symptoms within the first week following the injury would be a reasonable period.

Dr. Manraj Heran, neuroradiology

[162] Dr. Heran provided opinion evidence that the results of the plaintiff's second brain MRI are not indicative of multiple sclerosis. His evidence was not disputed and the defendants agreed in their final submissions that nothing turns on it.

IV. Credibility and Reliability

[163] In *Karim v. Li*, 2015 BCSC 498, Justice Abrioux (then of this Court) summarized the guiding principles for assessing credibility, including those relevant where is there little or no objective evidence of injury:

> [88] As Madam Justice Dillon noted in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para.186, aff'd 2012 BCCA 296:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny* (1951), 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C. C.A.) [*Faryna*]; *R. v. S. (R.D.),* 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 (S.C.C.) at para.128). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Faryna at para. 356).

[89] In addition, the following principles should be taken into account by the trier of fact:

> • no one can expect compensation in the absence of convincing evidence that complaints of pain are true reflections of a continuing injury: *Price v. Kostryba* (1982), 1982 CanLII 36 (BC SC), 70 B.C.L.R. 397 at 399 (S.C.);
>
> • every injured person has a different understanding of his or her own complaints and injuries and it falls to judges to translate injuries to damages: *Price* at 397;
>
> • where there is little or no objective evidence of continuing injury and where complaints of pain persist for long periods extending beyond the expected resolution, the court should be exceedingly careful to assess assertions in light of the surrounding circumstances including the medical evidence: *Price* at 399; *Tai v. De Busscher*, 2007 BCCA 371 at para. 41;
>
> • it is the doctor’s function to take the patient’s complaints at face value and offer an opinion based on them and it is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff’s complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor’s job to conduct an investigation beyond the confines of the examining room: *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, aff’d 2012 BCCA 114; and

> • in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries: *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1127 at para. 73, aff'd 2011 BCCA 516.

[164] I will make comments about the parties' credibility as they become relevant in the course of my reasons.

V. Injury and Causation Findings

A. Lay Evidence

[165] The defendants invite me to draw inferences about the plaintiff's cognitive ability and other symptoms based on his general presentation at trial, including what they characterize as him giving "very clear detailed evidence when it suited him" and having "no word-finding problems during cross-examination".

[166] I am not in a position to assess the plaintiff's level or nature of word-finding difficulty or determine what form, type or degree of memory impairment is diagnostically significant in the circumstances. These are not matters of common knowledge. That is why expert evidence is admissible here.

[167] In general, I found the plaintiff credible. His testimony was measured and well-considered, with no indication of over-reaching or exaggeration for effect. He readily conceded facts that did not advance his positions.

[168] Counsel for the defendants put some clinical notes to the plaintiff in cross-examination. Neither Dr. Carlson, Dr. Blocka, nor any of the plaintiff's rehabilitation treatment providers were called as witnesses at trial. (Dr. Cameron was the sole treating witness.) On cross-examination, the plaintiff agreed that he had or had likely made statements attributed to him in the clinical notes he was taken to by counsel.

[169] In analyzing the clinical notes before me, however, I note, Justice Smith's wise caution about the nature of clinical records in *Edmondson v. Payer*, 2011 BCSC 118 at para. 31–37, aff'd 2012 BCCA 114:

> [31] In *Diack v. Bardsley* (1983), 46 B.C.L.R. 240, 25 C.C.L.T. 159 (S.C.) [cited to B.C.L.R.], aff'd (1984), 31 C.C.L.T. 308 (C.A.), McEachern C.J.S.C., as he then was, referred to differences between the evidence of a party at trial and what was said by that party on examination for discovery, at 247:
>
> > ... I wish to say that I place absolutely no reliance upon the minor variations between the defendant's discovery and his evidence. Lawyers tend to pounce upon these semantical differences but their usefulness is limited because witnesses seldom speak with much precision at discovery, and they are understandably surprised when they find lawyers placing so much stress on precise words spoken on previous occasions.
>
> [32] That observation applies with even greater force to statements in clinical records, which are usually not, and are not intended to be, a verbatim record of everything that was said. They are usually a brief summary or paraphrase, reflecting the information that the doctor considered most pertinent to the medical advice or treatment being sought on that day. There is no record of the questions that elicited the recorded statements.
>
> …
>
> [34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.

[170] The frailties described by Justice Smith are on full display here.

[171] Dr. Carlson's note-taking style, in particular, is minimal. For example, the entire note for the plaintiff's May 9, 2017 appointment (the first visit following the First Accident) reads:

> was in a MVA, rear ended, he will bring in a note, headache, Arm pain will refer to Manual Therapy.

[172] In my view, this note is of absolutely no assistance in determining what the plaintiff did – or did not – report as a symptom on May 9, 2017. To the defendants' credit, they do not argue that I should place any particular weight on it in that respect.

[173] The defendants do, however, rely on Dr. Carlson's notes in respect of the plaintiff's April 20, 2018 appointment. That note – in its entirety (and as is) – reads:

> H els working in rulings , and prefer this
> almost back to normal now , some of the neuro-persistant sx

[174] When this note was put to the plaintiff on cross-examination, he agreed that he had said that to Dr. Carlson. However, in my view, this note is meaningless. Even setting aside the complete lack of context: what is normal and what is persisting? The fact that the plaintiff agreed that he said something that resulted in the note being merely begs the question of what the note supposedly means.

[175] I do not find the remaining statements that the plaintiff was taken to be of any more assistance. A person may well tell a health care provider that they are better or worse in some relative sense on any given day. This is especially so where, as here, the plaintiff was trying a variety of different treatment approaches hoping to identify something that might lead him to meaningful improvement. There is no evidence of context to make any of the plaintiff's comments to treatment providers particularly meaningful and also no pattern of like comments. To the contrary, the pattern here reveals is a very few instances of more optimistic feedback against a broad background where the plaintiff is making ongoing complaints and steadily reporting an absence of any meaningful improvement to Dr. Cameron.

[176] The defendants also allege that the plaintiff provided inconsistent or inaccurate information to the expert witnesses. As a general comment, I do not find the supposed inconsistencies pointed out by the defendants to be problematic. There are too many to slavishly inventory, but I will address the more significant assertions.

[177] The defendants point to the fact that the plaintiff, in filling out a self-filled PHQ-9 depression evaluation questionnaire for Dr. Fung, checked a concluding box indicating that he found it "not difficult at all" "to do work, take care of things at home, or get along with people". However, the check box specifically refers back to the nine questions set out just above, which relate to depression symptoms. It is, in my view, unreasonable to read the final check box as if the plaintiff indicated that he has "no

problems" in general, as opposed to no problems associated with those depression symptoms.

[178] The defendants also point to a note in Dr. Fung's report, in which she indicates that in January 2019, the plaintiff told someone at a Concussion Clinic that he was working full-time and "managing to keep up with work load demands based on his experience". The plaintiff did not deny having said that. However, it is clear from Dr. Fung's report that the plaintiff also reported work-related difficulties to the Concussion Clinic including often leaving work early due to symptoms, feeling his productivity had decreased, having been given an accommodation to complete a work examination, and having "crashed" after writing that examination. The plaintiff's confirmation that he said the portion seized upon by the defendants must be read in the context of his broader comments to the Concussion Clinic. When that is done, I am satisfied that the plaintiff's overall reporting to Dr. Fung (and the Concussion Clinic) was consistent with his testimony at trial – that is, he was not, in fact, "keeping up" with work even though he had the technical knowledge basis to do it.

[179] There is also an issue as to whether the plaintiff reported to the experts that he did not go shooting "at all" anymore or did not go shooting "as he used to" anymore. This strikes me as a point of plausible ambiguity with respect to a non-central fact. Accordingly, it has no impact on my assessment of the plaintiff's credibility or other evidence.

[180] Another issue raised by the defendants is the fact that the expert reports refer to the plaintiff's having been knocked out as a child. (As above, the plaintiff's testified that he could not recall ever having been knocked unconscious prior to the First Accident.) The evidence before me does not put me in a position to make a finding as to what was actually said by the plaintiff to the experts on this point. Further, the expert reports indicate that both Dr. Fung and Dr. Finlayson were provided with a report from the plaintiff's 2019 attendance at a Concussion Clinic as part of their document review and it appears from Dr. Fung's report that at least some historical information was taken from that document. The Concussion Clinic record was not

adduced in evidence before me. However, the confusion arose, the evidence does not put me in a position to conclude it sits at the plaintiff's feet.

[181] Finally, the defendants take issue with what the plaintiff having failed to specifically report pre-existing neck pain to Dr. Finlayson.

[182] In oral testimony, Dr. Finlayson clarified that she had asked plaintiff if he was not affected by neck pain at the time of the First Accident. In his own testimony, the plaintiff said that prior to the First Accident, he suffered general joint pain and stiffness as a result of his arthritis. Mr. Hildebrandt's testified that the plaintiff occasionally complained of aching joints, but not specifically about neck pain. The plaintiff agreed on cross-examination that the massage therapy he had for joint pain was primarily directed at his neck and lower back areas.

[183] I accept Dr. Finlayson's testimony that the plaintiff reported to her that he was not affected by neck pain prior to the First Accident. However, I do not view the plaintiff's negative response to that as intentionally misleading. When viewed in its overall context, I find it likely that the plaintiff denied he had specific neck pain and understood that she was aware from his records that he suffered joint pain generally as a result of his arthritis. This would be consistent with his description in direct testimony.

[184] Overall, I found the plaintiff, as well as the other lay witnesses, credible and reliable. I note that neither Mr. Snyder nor the CRA employees have a personal relationship with the plaintiff outside of their work capacities. While Mrs. Main and Mr. Hildebrandt have very close personal relationships with the plaintiff, it is my opinion that they both made a conscious effort to be factual and fair in giving their evidence.

[185] Taken collectively, the evidence of the various lay witnesses is cohesive and complementary. They uniformly expressed the view that the plaintiff was a significantly different person after the First Accident than he was before it.

B. Summary of Findings

[186] Turning to more specific matters, I accept the plaintiff's evidence that he has no recall of the first impact that occurred in the First Accident. He initially thought that he must have rear-ended the car ahead of him and caused the First Accident himself. There is a gap in his memory. All of the experts before me agree that even a brief gap in memory is sufficient to count as a loss of consciousness for the purposes of diagnosing a TBI.

[187] The plaintiff testified that he had a headache, felt nauseous and was sensitive to light and noise within hours of the First Accident. The defendants note that there is no corroborating evidence in the form of the plaintiff reporting these symptoms to someone else immediately following the Accident. I do not consider this a suspicious gap in the evidence, but rather a natural reflection of the way things unfolded. Mrs. Main's brain shunt had twisted in the First Accident and her neck was injured. Mr. Main testified that he was concerned about her shunt having twisted. She testified that she was focussed on herself after the First Accident. In comparison, the plaintiff assumed his own symptoms from the accident would fade away with some time. They only took on real significance as they failed to do that.

[188] Mrs. Main testified that within days of the Accident, the plaintiff was irritable, bothered by lights and objecting to noise. Mr. Hildebrandt, who sees the plaintiff every Thursday and Sunday, testified that when they met again, the plaintiff complained that his headache from the First Accident was not going away. On the evidence of Mr. Hildebrandt, the plaintiff and Mrs. Main, I am satisfied that the plaintiff did have significant concussion symptoms within a week of the First Accident, which Dr. Fung opined to be a reasonable time frame for onset.

[189] Further, for the reasons set out in *Edmondson* and due to Dr. Carlson's mode of note-making, I place no weight on the fact that no symptoms other than headache are listed in Dr. Carlson's May 9, 2017 and other early clinical notes. I find it probable that the plaintiff did tell Dr. Carlson about other concussion symptoms. In particular, Mrs. Main's evidence is that his light and sound sensitivities manifested

before he went to see Dr. Carlson and it stands to reason he would mention them. That said, it is reasonable to think that the plaintiff framed his headache as his central complaint, which is reflected in Dr. Carlson's notes.

[190] The evidence establishes that although the plaintiff continued to work after the First Accident, he quickly began adopting adaptive behaviours, both in work and social settings. He went to work earlier to make use of his morning productivity. He started wearing sunglasses everywhere and staying home when he could. He tried sitting in the back of church and staying only for the quiet parts. When things still did not improve, the plaintiff took a leave from work with Dr. Carlson's support.

[191] During the leave months, the plaintiff largely stayed at home and was thus in a controlled environment. He avoided doing things that would make his headache worse, including avoiding doing anything cognitively demanding. He no doubt did feel better during the leave period, but largely as a result of him avoiding aggravation, as opposed to healing. He also learned some things that helped him better deal with his symptoms (for example, using icepacks to relieve pain from his headaches).

[192] I find that the plaintiff did feel better after taking his leave from work, for the reasons outlined above. He then embarked on a graduated return to work. He was able to transfer into GST Rulings, which was a relief to him. Thus, I find that the leave period and early 2018 were periods of "improvement" in a relative sense. Dr. Fung testified that there may be waxing and waning of cognitive impairment within a range. Accordingly, I find that there may have been some waxing and waning in the plaintiff's condition, but I am not persuaded that it involved any sudden or marked improvement of symptoms.

[193] I am satisfied that there has been little, if any, improvement beyond slight waxing and waning in terms of the plaintiff's actual symptoms since the First Accident. Rather, his external circumstances and his coping skills have changed and the result has been to alleviate, somewhat, the degree to which those symptoms are impacting him.

[194] I accept that periods of increased pain and stress following the Second and Third Accidents likely resulted in temporary aggravations of the plaintiff's cognitive symptoms in the manner described by Dr. Cameron and Dr. Fung. However, the aggravating effects were not significant enough to be noted by third parties. Dr. Cameron believes the plaintiff's MS Panic may have had a similar impact in the period after he learned the results of the second MRI. Mr. Hildebrandt's evidence suggests this latter aggravation might have been noticeable. There is no evidence, however, that any of these aggravating factors had any lasting impact.

[195] The evidence also satisfies me that the plaintiff's work performance, both in terms quality and quantity, was consistently poor following the First Accident. I accept the evidence of the CRA witnesses on this matter, as I find them credible and their testimony to be consistent. I accept Mr. Ng's evidence that, but for his disability accommodation and an adjusted performance standard, he would have had to give the plaintiff a Level 1 rating.

[196] I will return to the plaintiff's work performance with respect to the loss of earning capacity claims, but for present purposes I find that the plaintiff did not mislead the expert witnesses in reporting that his work performance was unsatisfactory.

C. The Expert Evidence

Cameron Report

[197] The defendants argue that Dr. Cameron's evidence should not be given any weight for the following reasons:

a) No cognitive screening was performed by him;

b) He refused to accept the benefit of neuropsychological testing (in contrast to Drs. Fung and Finlayson);

c) They take issue with para. 65 of his report, in particular, submitting that:

> His ultimate opinion found at para. 65 of his report is founded on no testing and on evidence that is not supported by the evidence. As an example, he noted that Mr. Main is only functional for 1 to 1 ½ hours. He relied on the fact that Mr. Main only worked 4 days per week as a problem when Mr. Main had always worked a 4 day work week. He notes that Mr. Main modified his out of work activities in order to try to continue to work. There was no evidence of that at trial. He said that Mr. Main was not able to perform any activities in the weekends or evenings in order to try to maintain his work pattern. The defendants are not clear where the assumed facts found in para 65 of his report came from. In any event, they do not match the evidence at trial. Given that the assumed facts are not proven, that alone undermines the opinion.

d) His evidence conflicts with his earlier statements in the Pension Letter and the Health Form; and

e) He testified in an evasive manner.

[198] I disagree with the defendants' argument that Dr. Cameron's report should not be given any weight. I will address their points in order.

[199] First, I do not consider it a flaw that Dr. Cameron did not conduct a MoCA or other screening test as part of his own assessment. While Dr. Fung said she performed the MoCA because there were no screening results already in the file, she did not criticize Dr. Cameron for making a diagnosis without performing one. To the contrary, she said it was, in her view, "preferable" to use one to "confirm" impairment. In the end, her MoCA results were confirmatory and she concurred with the diagnosis Dr. Cameron had made based on his personal assessments.

[200] Similarly, while Dr. Finlayson and Dr. Fung recommended neuropsychological testing, both made a diagnosis without test results. They referred to neuropsychological testing as something that could *confirm* diagnosis and of possible assistance in adaptive treatment. Further, while Dr. Fung agreed that she might have wanted to see neuropsychological test results before making her diagnosis if the plaintiff was meeting his work performance standards, I have found that the plaintiff was not. Thus, Dr. Fung had an accurate understanding of his work performance at the time of her report.

[201] On the defendant's third point, para. 65 of Dr. Cameron's report reads:

> 65. It is my opinion that Mr. Main has been rendered permanently competitively unemployable predominantly due to the residual adverse effects of the injuries that he sustained at the time of these three accidents, in a cumulative effect type manner, and in particular the accident on April 30, 2017. Mr. Main is only able to be up and active for approximately 1 to 1-1/2 hours at a time before he has to rest during the day. Even prior to the development of these sensory complaints due to the demyelination secondary to Remicade medication he was requiring excessive sleep. He had to rest during the weekends to prepare to return to work for the following week. He was working four days per week at Canada Revenue Agency as an auditor. This pattern of incomplete or unsustained work capabilities was not significantly changed following the new-onset sensory complaints secondary to the demyelination complication of the Remicade medication. It is my opinion that Mr. Main probably would have gone off work at that time, as a result of these three accidents, due to cumulative adverse effects of these physical injuries and his inability to sustain full-time employment. He was modifying his out-of-work activities in order to try to continue work. As a result he was not able to perform any activities in the weekends or evenings in order to try to maintain his work pattern. Even with these modifications which he needed to undertake after he returned to work, he was unable to sustain full-time employment in an unrestricted fashion for CRA, and he had to go on long-term disability. He is officially retiring in October 2022. Absent the three accidents, he probably would be still working full-time at his previous job.

[202] Earlier on in the report (para. 21), Dr. Cameron expressly noted that the plaintiff has always worked four days a week at the CRA. Thus, as I read it, his para. 65 does not suggest that the plaintiff's schedule had changed, but rather highlights the fact that he had had the benefit of three-day weekends for rest.

[203] The plaintiff, Mrs. Main and Mr. Hildebrand all provided evidence indicating that the plaintiff now suffers fatigue persistently (i.e., as opposed the occasional day every few months as was the case prior to the First Accident). Their evidence also indicated that the plaintiff has done relatively little on weeknights and weekends in the time since the First Accident. The plaintiff testified that he begins needing to take breaks relatively soon after arriving at work and the frequency and regularity of those breaks was commented upon by several of the CRA witnesses. On that evidence, there is a factual basis established at trial for Dr. Cameron's observation that even with rest and a three-day weekend, the plaintiff had proved unable to work productively in a sustained fashion.

[204] I do agree with the defendants that there was no evidence at trial that the plaintiff rested and stayed at home as part of a concerted effort to improve his ability to work, however, I do not view Dr. Cameron's conclusions in para. 65 as resting on that proposition. Thus, I do not agree with the defendants' criticism of para. 65 as factually unfounded.

[205] That brings me to the Pension Letter, the Health Form and Dr. Cameron's testimony about what he meant to convey by them. I agree that, on its face, the Pension Letter suggests that the Remicade was a contributing cause in the plaintiff's cognitive dysfunction. While the Health Form is more ambiguous, it can be read as making that same suggestion.

[206] However, the nature and purpose of the Pension Letter and Health Form must be considered. Neither purports to provide a comprehensive medical report. Further, both documents had a specific purpose. What the pension administrator and Health Canada wanted was a short answer to the question of whether the plaintiff was permanently disabled from working and, if so, whether that disability was health-related. The specific details of medical causation were not pertinent to the decisions they were making.

[207] The nature of these documents is such that Dr. Cameron would have completed them fairly quickly and directed the information to the specific interests of the recipients. It would be reasonable to expect Dr. Cameron to be more precise about causation if distinctions in causation mattered to his audience, but they did not. On the other hand, causation matters in this litigation, and here Dr. Cameron has provided a lengthy expert report addressing causation in detail.

[208] I do not find the surface contrast between the Pension Letter and Health Form and Dr. Cameron's expert evidence before the court troubling in the circumstances. Dr. Cameron has not said inconsistent things, so much as directed each document to the interests of the specific audience.

[209] I accept Dr. Cameron's explanation that he had in mind, when he was writing the Pension Form and the Health Form, that MS panic was affecting the plaintiff, but did not provide an express explanation. I note that the Pension Letter and Health Form are close in time to the plaintiff's seeking a second expert opinion as to whether his lesions were indicative of multiple sclerosis. The potential that the lesions were indicative of multiple sclerosis was clearly a live and concerning issue in the preceding time period, or the second opinion would not have been obtained.

[210] Dr. Cameron is a highly qualified expert and his opinion here is based on having conducted more than 15 personal assessments on the plaintiff over multiple years. On the whole, I find his opinion is reliable and persuasive.

Finlayson Report

[211] The defendants raise three issues with Dr. Finlayson's report.

[212] First, she referred to the plaintiff's having been "knocked out" as a child. I have already described the plaintiff's testimony on this point. He does not recall ever having been knocked out. However, nothing in Dr. Finlayson's report turns on that incorrect fact. It is only one aspect of her discussion of factors that render a person more likely to suffer from prolonged TBI symptoms. On the corrected facts, the plaintiff has two of the three vulnerability factors, as opposed to all three. That does not materially affect any of her conclusions that the plaintiff is, in fact, among the individuals who did develop prolonged symptoms.

[213] Second, in diagnosing the plaintiff with myofascial neck pain, Dr. Finlayson assumed he had no history of severe, persistent or frequent neck pain prior to the First Accident. In fact, the plaintiff had had neck pain as part of the general joint pain he suffered from due to his arthritis prior to the First Accident.

[214] In the medical report of Dr. Blocka shown to Dr. Finlayson on cross-examination, Dr. Blocka noted that the plaintiff has "chronic neck pain" as part of his "rhematological diagnosis". Dr. Blocka was not called as a witness. Among other

things, it is unknown how he defined “chronic” or whether it is relevant that it was specifically listed as a “rheumatological diagnosis”.

[215] The plaintiff testified that he had occasional neck pain from his arthritis and that his neck was one of the primary areas treated in the massage therapy he had for joint pain about five times a year. He described the pain as aching and stiff joints generally. Mr. Hildebrandt said the plaintiff occasionally complained of aching joints, but could not recall his specifically complaining about neck pain.

[216] In her testimony, Dr. Finlayson described the type of neck pain one would typically expect to see with psoriatic arthritis as diffuse pain. She described the myofascial neck injury she diagnosed as being localized. I am satisfied based on her description of these types of neck pain and the evidence before me that the plaintiff’s pre-existing joint pain affecting his neck and his post-Accident localized neck pain are distinct.

[217] Dr. Finlayson’s report also states that the same forces involved in a whiplash-type TBI also commonly result in myofascial neck injury. As I accept that the forces in the First Accident were sufficient to cause a whiplash-type TBI, I am satisfied that it is highly probable that a myofascial injury would be sustained as a result of those forces as well.

[218] I find that the plaintiff now suffers myofascial neck pain, whereas prior to the First Accident, he did not. His myofascial neck pain is caused by the Accidents.

[219] Finally, the defendants take issue with the fact that Dr. Finlayson, in concluding that the plaintiff was unable to perform his CRA job, described him as having been working as “an accountant”. The defendants say he was not working as an accountant. No definition of “accountant” for these purposes, colloquial or otherwise, was provided. I suspect that many people would consider it fair to describe work done by a CPA and involving tax assessment to be “accountant” work in the broad sense. In any event, Dr. Finlayson also specifically described the nature of the plaintiff’s CRA work, saying that it required strict attention to detail and

processing complex information. That is a fair description of his CRA work. I find she had, in fact, an accurate understanding of the nature of his work.

[220] I found Dr. Finlayson to be an extremely fair and persuasive witness. I accept her report.

Fung Report

[221] I also accept Dr. Fung's report.

[222] I note that she agreed it might make a difference to her opinion if the plaintiff was meeting his work performance expectations. While that was fair on her part, I have concluded that he was not.

D. Further Summary of Findings

[223] In summary, I find that the plaintiff suffered a mild TBI in the First Accident and developed persistent and prolonged PCS symptoms as a consequence of that TBI. His symptoms include headaches, cognitive dysfunction, sensitivities to light and noise, and changes in mood and personality. There has been some waxing and waning in his symptoms, including some improvement achieved by lessening his exposure to aggravating stimuli and adaptive behaviour, and perhaps temporary worsening due to pain and psychological stress from the Second and Third Accident and/or the psychological stress of a potential multiple sclerosis diagnosis. However, his prolonged PCS symptoms have remained essentially the same since the First Accident and the Second and Third Accident had no lasting detrimental effects on his cognitive symptoms.

[224] The plaintiff suffers from myofascial neck pain as a result of the Accidents. I find that his myofascial neck pain began after the First Accident, but was exacerbated and became more persistent following the Second and Third Accidents.

[225] I accept Dr. Finlayson's view that the plaintiff suffers persistent headaches predominantly as a result of the TBI itself, although his myofascial neck pain may be a contributing cause.

[226] The plaintiff has probably reached maximal medical improvement. No further improvement in cognition is expected. Recommended treatments are aimed at enabling the plaintiff to maintain his current level of function and to temporarily reduce pain levels with better pain management.

[227] For reasons I will expand on under loss of earning capacity, I find that the plaintiff was rendered unable to sustain his continued employment at the CRA and that he is unlikely to be able to return to work, even in a part-time capacity.

VI. Non-Pecuniary Damages

[228] In *Siu v. Clapper*, 2020 BCSC 944 at para. 14, Justice Gomery summarized the purpose of non-pecuniary damages and established factors for consideration:

> [14] Non-pecuniary damages are awarded as compensation for past and future pain, suffering, disability, and loss of enjoyment of life. The Court must take into account both the seriousness of the injury and the ability of the award to ameliorate the condition or offer solace to the victim: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 45, leave to appeal ref'd, [2006] S.C.C.A. No. 100 [*Stapley*]. In *Stapley* at para. 46, the Court noted a non-exhaustive list of factors to be considered: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and stoicism as a factor that should not, generally speaking, penalize the plaintiff.
>
> [15] An award must be fair and reasonable, and fairness is measured against the awards made in comparable cases, recognizing that other cases provide only a rough guide. Each case must be decided on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189.

[229] The plaintiff seeks $200,000 as a non-pecuniary award, relying on the following cases as comparables.

[230] In *Mastromonaco v. Moraal*, 2015 BCSC 228, the plaintiff was a 44 year old schoolteacher at the time of injury. She suffered a mild TBI, psychological injuries, and soft tissue injuries. Her physical symptoms resolved well before trial, but she continued to show signs of depression and social isolation. Her most significant injury by far was her TBI. Her ongoing symptoms included irritability, anxiety, poor memory, lack of concentration, lack of motivation, distractibility, fatigue and general

low mood. She had stopped working as a schoolteacher, but the Court found she might have ceased teaching in any event of her injuries. She was awarded damages of $160,000 ($198,000 in 2023).

[231] In *Harrison v. Loblaws, Inc. (Real Canadian Superstore)*, 2018 BCSC 575, the plaintiff was 48 year old book-keeper/assistant at the time of injury. She was a happy, active and outgoing person before the accident. She sustained a mild TBI and her ongoing symptoms included headaches, dizziness, nausea, fatigue and cognitive symptoms including difficulties with memory and concentration. She was permanently disabled from working. She was socially withdrawn and no longer able to do any of her pre-accident activities, including walking, swimming and travelling. Her prognosis was poor. She was awarded damages in the amount of $175,000 ($205,000 in 2023).

[232] In *Wallman v. John Doe*, 2014 BCSC 79, the plaintiff was a 53 year old emergency room physician who loved his work. He suffered a mild TBI and developed ongoing symptoms of headaches, dizziness, nausea, vomiting, physical and mental fatigue, confusion, sensitivity to noise and light, irritability, depression and anxiety, and problems with vision, concentration, multi-tasking, speech and communication. The court said of his condition:

> [472] There is no question that the plaintiff's life has changed profoundly as a result of the Accident. His ability to function in everyday life has been significantly impaired. He has considerable cognitive challenges that will likely affect him for the rest of his life. He has lost his overall confidence. He struggles to make decisions and initiate activities. He is inattentive and displays poor judgment. He has withdrawn socially. His thresholds for mental and physical activities are limited to approximately 2 hours and 30 minutes, respectively, beyond which he becomes symptomatic. He is no longer able to practice as an emergency room physician, a job he was passionate about and proud of. His ability to interact with and enjoy his children has been impaired. The medical experts are of the opinion that his recovery has likely plateaued.

His non-pecuniary damages were assessed at $200,000 ($250,000 in 2023).

[233] The defendants submit that $120,000 is a fair award for non-pecuniary damages and rely on *Tanaka v. Gill*, 2023 BCSC 344 and *Nahal v. Ram*, 2016 BCSC 39 as comparables.

[234] Mr. Tanaka was a 46 year old IT support professional at the time of his injury. The court described the impact of his injuries as follows:

> [81] Mr. Tanaka is now 50 years old. The accident occurred four years ago. In its immediate aftermath, he suffered from fatigue, sensitivity to light and noise, nausea and dizziness, but those symptoms resolved within a few weeks. He continued to feel pain, especially in his back, until he received the epidural injection in March 2022. Although his physical symptoms have now largely resolved, he continues to suffer from cognitive deficiencies and psychiatric symptoms, particularly anxiety and depression. He has been diagnosed with a neurocognitive disorder and adjustment disorder, with anxiety and depression secondary to these. He is not performing to his previous standard at work, which has contributed to low self-esteem and fear for the future. His injuries have impacted his ability to carry on the activities that he used to enjoy. His social relationships have been adversely affected.

He was awarded $96,000 in general damages.

[235] In *Nahal,* the plaintiff was only 17 years old at the time of his injury. He suffered soft tissue injuries to his neck and back, but these were largely resolved by trial. He had headaches regularly after the accident, but only weekly by the time of trial. He suffered a mild TBI and had ongoing cognitive issues, including memory problems, but had finished high school and had managed to complete a college course. He worked at the reception desk for an animal hospital and had passed a real estate course. He had discontinued his sports and gym activities and gained weight. His friends described him as outgoing, active and caring before the accident, and as quiet, lethargic, withdrawn and appearing depressed afterward. The court found the accident had compromised his abilities and chances of a successful and satisfying future. His general damages were assessed at $100,000 (123,300 in 2023).

[236] Turning to the evidence before me, I accept the testimony of the plaintiff and other lay witnesses as to the impact of the plaintiff's symptoms on him, including as to how his social, recreational and family life have been impacted.

[237] The plaintiff has seriously altered his lifestyle since the First Accident. He and his wife no longer go camping or out driving for fun. They cannot socialize with local friends and family without planning around whether and how the plaintiff can be accommodated. Mr. Main is afraid to fly anywhere because the air pressure increases his headaches, and one of Mrs. Main's sisters resides in the Cayman Islands. The plaintiff and his wife now stay home most of the time. His injuries have affected their sex life, but he and his wife continue to have a loving and supporting relationship.

[238] Mr. Snyder has found ways for the plaintiff to stay engaged with weekly services, but the plaintiff's interactions with the church are not as they used to be. He can only attend the "accessible service". He no longer does volunteer set up work. If he attends a church discussion group, the lights have to be lowered and people have to be asked to speak quietly. He goes sometimes, but it affects the group dynamic. He continues to attend the men's coffee night meetings at Mr. Hildebrandt's.

[239] The plaintiff and Mr. Hildebrandt fish regularly, but no longer go up to the cottage or to lakes in the Interior. Instead, they go for half day outings to local lakes.

[240] Mr. Hildebrandt testified that they used to go to the gun range twice a month, but now go twice a year. He said they use the range only when no one else is there, use handguns, and have full protective hearing equipment, all to reduce the noise. He said they usually shoot for under an hour.

[241] The defendants question the plaintiff's continued attendance at the shooting range. I agree that it is contrary to expectations given his noise sensitivity, however, he and Mrs. Main both testified that some noises are more and less tolerable than others and that it is not simply an issue of volume. Notably, guns and target shooting were of keen interest to the plaintiff prior to the First Accident. The plaintiff is hardly the first person to obstinately draw a line in the sand and refuse to give up entirely an important aspect of his former life. In any event, it is clear that he can no longer participate in the way that he used to.

[242] By all accounts, the plaintiff loved his work. Mr. Grewal said that in all his time with the CRA, he had only known one other person to be as enthused as the plaintiff. The plaintiff's CRA career was a significant component in his sense of self and self-worth.

[243] The plaintiff suffers from myofascial neck pain. It is painful, but it is not severe in nature and he obtains temporary relief from massage therapy.

[244] He remains able to perform the household chores he did before the Accident, but at a slower pace.

[245] Overall, he is able to continue with some of his other former recreational activities, but only in a restricted fashion. He is capable of doing some volunteer work hours, provided he can control which hours and how many. He is fortunate in his relationship, in that it remains strong and Mrs. Main remains a well-suited companion in living a quiet life.

[246] I note that the defendants did not ask that the award for non-pecuniary damages be discounted on the basis of the plaintiff's psoriatic arthritis as a pre-existing condition, but did submit that it should be a factor for consideration in assessing the amount awarded.

[247] Based on my findings above, the impact of the plaintiff's arthritis is relatively distinct from the impacts of the Accidents. His headaches and cognitive symptoms are predominately due to his TBI injury. The physical pain he suffers from his myofascial neck injury is not a significant component of the overall impact of his Accident-related injuries. In any event, there is no evidence before me as to the likely progression of his psoriatic arthritis over time or its likely impact on his quality of life. Any adjustment would be speculative in the circumstances.

[248] Overall, the plaintiff's symptoms have had a more serious impact on his life than was the case in *Tanaka* and *Nahal*. However, the plaintiff is also less severely impacted than the plaintiff in *Wallman*.

[249] I find *Mastromonaco* and *Harrison* both quite comparable in terms of the nature and degree of injury (although Ms. Mastromonaco did not experience permanent headache or light or noise sensitivity). Mr. Mastromonaco and Ms. Harrison were also both close in age to the plaintiff at the time of injury.

[250] I conclude that the $200,000 sought by the plaintiff is fair and reasonable.

[251] The plaintiff is awarded **$200,000**.

VII. Loss of Earning Capacity

A. Legal Framework

Past Loss

[252] The legal test for past loss of earning capacity is set out succinctly in *Luck v. Shack*, 2019 BCSC 1172 at paras 169-171:

> [169] In *Smith v. Knudsen*, 2004 BCCA 613, the Court of Appeal set out the legal principles regarding past wage loss. The Court summarized the legal principles as follows:
>
> > [28] There are a number of decisions of this Court which accord with what was said by the Supreme Court of Canada concerning proof of future and hypothetical events. One of those cases is *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133, [1990] 5 W.W.R. 365. In that case, Hutcheon J.A., for the majority, after making reference to a number of authorities including *Mallett v. McMonagle*, *supra*; *Janiak v. Ippolito*, *supra*; *Schrump v. Koot* (1977), 18 O.R. (2d) 337; and *Kovats v. Ogilvie*, [1971] 1 W.W.R. 561, referred with approval to Smith and Bouck, *Civil Jury Instructions* (1989) on the instructions to be given to a jury about the different standards of proof. The instruction, which is set out below, was said to be modelled on what was said by Lord Diplock in *Mallett v. McMonagle*, *supra*:
> >
> > > COMPARISON WITH STANDARD OF PROOF FOR ACTUAL EVENTS
> > >
> > > 5. In deciding what actually happened in the past, you must weigh the evidence and reach conclusions on a balance of probabilities. Anything more probable than not you should treat as certain. When you are asked to determine (what might happen in the future/what would have happened in the past but for the injury/loss), **you must use a different method of proof. First you must decide if the event (is/was) a real possibility, you must then determine the actual likelihood of its occurring** (at 138).

> [29] That instruction accurately reflects the distinction made in the case authorities between proof of actual events and proof of future or hypothetical events. What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.
>
> [Emphasis added.]
>
> [170] To determine compensation for past wage loss, I must consider what the plaintiff likely would have earned, not what she could have earned, if she had not sustained her injuries. It is not a mathematical formula: *Rowe v. Bobell Express Ltd*., 2005 BCCA 141 at para. 30; *Lui v. Bipinchandra*, 2016 BCSC 283 at para. 135; and *Hoy v. Williams,* 2014 BCSC 234 [*Hoy*] at para. 141.
>
> [171] A plaintiff is only entitled to recover the net amount of their damages: s. 98 *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231; and *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at paras. 152-186.

[253] Notwithstanding that the phrase “past wage loss” is sometimes used as a shorthand expression, the claim is for lost earning capacity. While actual lost income is often the most reliable measure of that loss of capacity, it is the lost capacity that is compensable (see *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19).

Future Loss

[254] An award for future loss of earning capacity is an assessment, not a mathematical calculation: *Steinlauf v. Deol*, 2022 BCCA 96 at para. 55. If losses are not amenable to precise calculation, the court is obliged to make its best estimate: *Dunn v. Heise*, 2022 BCCA 242 at para. 33.

[255] In *Rab v. Prescott,* 2021 BCCA 345 at para. 47, the Court of Appeal set out a three-step analysis to be applied in assessing damages for future loss of earning capacity:

(1) Does the evidence disclose a past or a potential future event capable of giving rise to a loss of capacity?

(2) Is there a real and substantial possibility that that event will cause a future pecuniary loss to the plaintiff?

(3) What is the value of that possible future loss, given the relative likelihood of it occurring?

[256] If the analysis proceeds to the third step in *Rab*, the court must determine whether the appropriate means for assessing the value of the future loss in the circumstances is the earnings approach or the capital asset approach: *Rab* at paras. 28 and 31. The Court of Appeal in *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 described those two methods of valuation:

> [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* [*v. Lalari,* 2010 BCCA 140] 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* [v*. Golaiy,* [1985] 26 BCLR (3d) 353, 1985 CanLII 149 (S.C.)] 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.

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

B. With Accidents Findings

[258] In saying there should be no award for lost capacity, the defendants assert that it was not reasonable for the plaintiff to choose to retire. They cite the following passage from *Riley* v. *Ritsco*, 2018 BCCA 366:

> [83] … Plaintiffs are not required to show that decisions they make are dictated by necessity. Rather, the question is whether a plaintiff has acted reasonably in selecting and following a course of treatment and rehabilitations, and in making lifestyle accommodations that are consonant with the injuries suffered. A plaintiff must also take reasonable steps to mitigate damages. Thus, Mr. Riley did not have to prove that he retired out of necessity. He only had to show that his decision to retire was a reasonable one.

[259] The defendants assert that working from home would have made the plaintiff's continued employment viable. The defendants say this was a viable option, given that the GST Rulings analysts have been permitted to work remotely since April 2020 (i.e., following onset of the COVID 19 pandemic). The defendants assert that the plaintiff's employment was therefore sustainable. The point to the following facts: Mr. Grewal described the plaintiff's rulings as still "generally on the right track", the plaintiff said his 2020 productivity was at the "average or lower end", the plaintiff made the Aspiring MGs program and was an acting MG5 during Mr. Ng's 2019 absence, and the plaintiff was awarded a permanent AU2 position just prior to his retirement. The defendants thus say his employment was secure and that he could have continued to work indefinitely.

[260] No one from the CRA testified that the organization had resolved to permit remote work arrangements indefinitely. However, even if that were the case, I am not satisfied that eliminating travel and enabling the plaintiff to have control over his work environment would improve his cognitive function, let alone improve it to the point of making him sufficiently productive to make his employment sustainable.

[261] Mr. Grewal did not testify that the plaintiff's work was acceptable, only that it was not completely wrong-headed. He said that on review he would spot issues that the plaintiff had missed. Mr. Mazerolle said that on review, he consistently found errors in the plaintiff's work. They both said it was common to suggest that the letter be entirely restructured. They were both investing significant amounts of their own time peer reviewing the plaintiff's work. Mr. Ng also peer reviewed some of the plaintiff's work. He testified that but for his disability accommodation, he would have given the plaintiff a Level 1 (unsatisfactory) rating on his performance reviews. At best, the plaintiff was at the lower end of productivity but, more importantly, he was producing work that had errors and required disproportionate peer review time.

[262] The defendants also misconstrue the impact of the CRA's accommodation efforts. The CRA is a large, sophisticated, unionized government employer. It appears to have taken its duty to accommodate a disabled employee very seriously.

The plaintiff's work performance standards were adjusted. He was given significant accommodations for the Aspiring MGs examination and considered eligible even though his recent performance reviews and his entry examination marks were themselves products of accommodations. Once in the Aspiring MGs program, he was supposed to be given an opportunity to act as an MG, which Mr. Ng fulfilled when he selected the plaintiff to act in his position for two weeks. He was given a permanent AU2 position even while on disability leave because the CRA viewed him as entitled to it under its policies. This is evidence of robust accommodation policies, not of the sustainability of the plaintiff's employment. During that entire period of accommodation, the plaintiff's ability to work productively did not improve.

[263] The CRA uses two years' disability leave without improvement as an established benchmark for reviewing employment status. The plaintiff hit the benchmark. Mr. Ng and Mr. James both checked if there was other, more suitable CRA employment for the plaintiff, and found none. Mr. James decided the plaintiff should be encouraged to apply for early medical retirement. Retirement is one means by which the employer can bring the accommodation process to a close.

[264] The plaintiff's decision to apply for early retirement on medical grounds was reasonable in the circumstances. The plaintiff was not obliged to force the CRA to resort to non-culpable termination in order to establish that he had mitigated his damages claim.

[265] As above, I also accept Dr. Fung's evidence regarding the plaintiff's potential for part-time work. In testimony, she explained that by part-time, she had in mind no more than a few hours a day. She opined that it was unlikely he could even do that. Her opinion in that respect is supported by the plaintiff's evidence of his attempt at doing volunteer work. He found the volunteer work aggravated his symptoms unless he spread it out very sparsely, and he did the volunteer work only three to four hours per week.

[266] I find it very unlikely that the plaintiff would be able to work part-time (as defined by Dr. Fung) and even less likely that he would be able to find an employer

and position suitable and sufficiently flexible to even attempt it. The defendants adduced no evidence of any employment that would be suitable. I find that as of his medical retirement date, the plaintiff had no residual employment capacity.

[267] Here, the event giving rise to a loss of capacity was the First Accident and, as of the date of the plaintiff's medical retirement, that loss was total (i.e., the plaintiff had no residual capacity for employment). Thus, the event giving rise to loss of capacity is established as is the probability of future pecuniary loss.

[268] The remaining task is the valuation of the loss – past and future.

C. Without Accidents Findings

[269] All of the CRA witnesses testified about the plaintiff's pre-Accident career potential at GST Rulings and about various GST Rulings positions that were posted and filled between the First Accident and the date of trial. On the latter point, AU2 postings come up regularly and fairly frequently, AU3 postings are less frequent and some include mandatory bilingual requirements, and MG5 opportunities come up regularly, but far less frequently than AU2.

[270] The defendants argue that the plaintiff made slow advancements in the CRA before the First Accident and that it is therefore unlikely that he would have made significant career advancements within the CRA but for the Accidents. I disagree. The evidence indicates that some people advance quickly and some people advance over time. This is consonant with the fact that people have a wide array of qualifications (e.g., some have accounting or other university degrees).

[271] The plaintiff was succeeding in GST Audit. He was involved in presenting in-house seminars and regularly assisted colleagues. He moved laterally (in fact slightly downward in income) to get into GST Rulings because he thought it would be more interesting to him. It was. He was very happy there and was producing superior work product. Experienced, senior GST Rulings employees regarded him as having the capacity and determination to move up. I find Mr. Grewal and Mr. Ng's evidence in this respect particularly compelling.

[272] I am satisfied that but for the Accidents, the plaintiff would have continued to excel as an SP6 in GST Rulings and would almost certainly have been awarded and succeeded in an AU2 or AU3 position eventually.

[273] Further, based on Mr. Ng's testimony, I am satisfied that but for the First Accident, the plaintiff would have been able to continue as an acting AU2 in July 2019 (i.e., would not have been moved back to his SP6 position). Given the number of permanent AU2 positions that were subsequently posted and filled, it is highly probable that the plaintiff would have been working in an AU2 position from July 2019 through to trial. There is a lesser, but real and substantial, possibility that he might have become an AU3 rather than an AU2 during that period.

[274] I further find that there was also a real and substantial possibility that the plaintiff might have obtained and held an MG5 position. I am not, however, satisfied that there was a real and substantial possibility that the plaintiff could have become an MG5 prior to trial. However, I would place the probability of the plaintiff's having eventually held an MG5 position in due course after the trial at 50 percent.

[275] The plaintiff testified that he would have worked until age 66 but for the Accidents. Working to 66 would have put him over a significant service threshold for pension purposes. Several of the CRA witnesses testified that the pension entitlement threshold was a factor in determining their own retirement dates. Further, the pension benefit he would have obtained by meeting the threshold would have been significant, and the plaintiff was the sole earner in the Main household. The plaintiff enjoyed his work. I am satisfied that the plaintiff would have chosen to continue to work full-time until he was 66 years old.

[276] Finally, I am satisfied that his CRA employment was extraordinarily stable and secure. Prior to the First Accident, he was a capable employee with about a decade of seniority. In the CRA context, those factors would have effectively assured him employment, unless and until he was rendered incapable or voluntarily withdrew from the workforce.

D. Past Loss Valuation

[277] Christiane Clark, a labour economist, provided two expert reports for the plaintiff: an initial report dated January 20, 2023 (“Report”) and a supplementary report dated April 20, 2023 (“Second Report”). There were no objections to her qualifications, and I find her to be well-qualified to make these reports.

[278] The plaintiff was off work on the recommendation of Dr. Carlson from the beginning of August 2017 through to November 15, 2017 (approximately three and a half months) (“Leave”). During the Leave period, that plaintiff used his sick days and vacation time (which are part of his employment compensation package) and received Employment Insurance benefits (“EI benefits”).

[279] The plaintiff contends that these benefits are all collateral benefits coming within the “insurance exception” to the rule against double recovery and thus should not be deducted from the calculation of the plaintiff’s past wage loss: see *Luis v. Marchiori*, 2015 BCSC 1 at paras. 181–186. The plaintiff also submits that the pension payments he received prior to trial are collateral benefits earned as compensation and similarly non-deductible*: Lai v. Griffin*, 2020 BCSC 377 at paras. 112–114.

[280] I am satisfied that the benefits the plaintiff received during the Leave and the pension benefits paid following his medical retirement up until trial are all benefits that were earned by the plaintiff and are non-deductible. I note that the defendants did not mount any argument to the contrary.

[281] During the Leave period, the plaintiff was an SP6 earning about $70,295. Thus, during the Leave, he lost the following gross income: (70,295 ÷ 12) × 3.5 = $20,503.

[282] Ms. Clark has also calculated the plaintiff’s past lost income from when the plaintiff returned after the Leave period on the basis that he would have continued as an acting AU2 in July 2019 and then subsequently became a permanent AU2 in the

period through to trial. She calculates his loss for the period after July 2019 (when he was demoted to SP6) through to trial as $260,646.

[283] Based on the above, the plaintiff calculates his gross lost income as $280,000 (the approximate value of $20,500 + $260,000). The plaintiff then applies the reduction formula used in Ms. Clark's report to account for income taxes and employment insurance premiums ($280,000 x 0.839) to arrive at a value of $234,920 for net lost income. I am satisfied that this is a fair calculation and accept the plaintiff's submissions on this point.

[284] The plaintiff is awarded **$234,920** for past loss of earning capacity.

E. Future Loss Valuation

[285] The facts of this case are appropriate for an earnings-based approach: *Rab*, at para. 46.

[286] Ms. Clark provided estimates for the plaintiff's future lost income based on three different scenarios: if the plaintiff stayed an AU2 from trial through to his retirement ("AU2 Scenario"), if he moved from an AU2 position up into an AU3 position ("AU3 Scenario"), and if he moved from an AU2 position up into a MG5 position ("MG5 Scenario").

[287] In her various calculations, Ms. Clark has applied "risk only" labour market contingencies based on an assumption that the plaintiff would not have chosen to leave the labour market or work part-time prior to retirement. That assumption is validated by my findings above.

[288] In Table 3 of her Second Report, Ms. Clark has calculated the plaintiff's probable without-Accidents earnings for the AU2 Scenario as $1,098,129.

[289] For the MG5 Scenario, Ms. Clark calculated the without-Accidents probable earnings of the plaintiff on the basis of him moving into an MG5 position by January 1, 2022, and then continuing in an MG5 role until retirement (Second Report, Table 4) as $1,279,120.

[290] For the AU3 Scenario, Ms. Clark did a similar calculation based on the possibility that the plaintiff might have obtained the AU3 position that was awarded to another employee (Kevin Tran) in 2023. Mr. James testified that under the applicable evaluation for promotion formula, had the plaintiff applied, the plaintiff and Mr. Tran would have both met the minimum requirements. The plaintiff was qualified and he was interested. I find there was a real and substantial possibility that the plaintiff would have obtained an AU3 position (possibly the one obtained by Mr. Tran). Ms. Clark's calculation for the AU3 Scenario was $1,219,617.

[291] The evidence regarding the frequency of AU3 (with no bilingual requirement) and MG5 position openings makes the MG5 Scenario significantly more probable than the AU3 Scenario.

[292] The plaintiff seeks an award of $1,190,000, which is a rounded average of the rounded figures of the AU2 Scenario and the MG5 Scenario. In my view, this approach is supported by my conclusions that the plaintiff had a 50 percent probability of becoming an MG5 at some point, and there was also a real and substantial possibility that he would have become an AU3.

[293] The plaintiff is awarded the amount of **$1,190,000** for loss of future earning capacity.

F. Future Extended Benefits

[294] The plaintiff is currently paying for extended health benefits ($130 a month), dental benefits ($37 a month) and for supplemental death benefits ($27 a month). All three of these benefits would have been covered as part of his compensation package had he been able to continue working at the CRA.

[295] In the Second Report, Ms. Clark calculated the present value of the plaintiff's future cost for dental and extended health benefits as $24,630. In her testimony, she stated that she had omitted the supplemental death benefits in her calculations and that the calculation of the additional cost (at $27 per month to age 66) would be a further $3,989.

[296] The plaintiff is awarded **$28,619** for the loss of these future extended benefits.

G. Loss of Pension Benefits

[297] The plaintiff claims for loss of pension benefits as a result of his medical retirement. That is, he claims a loss on the basis that, by taking early retirement and receiving a pension earlier than he would have otherwise, the amount that he will now receive from his pension after he turns 66 will be less than it would have been if he had retired and started drawing on his pension at age 66.

[298] Ms. Clark has set out calculations valuing this loss in her Second Report.

[299] Under the AU2 Scenario, she calculates the net present value of the plaintiff's pension benefits (adjusted for labour market contingencies) at $318,009. Under the MG5 Scenario, this number is $446,726. In her First Report, Ms. Clark calculated the net present AU3 Scenario value, adjusted for retirement at age 65, as $381,789 and at age 67 as $335,499 (for a mid-point number of $358,644).

[300] The analysis here parallels that applied in assessing the plaintiff's probable future earnings: the AU2 scenario is virtually certain, the plaintiff's becoming a MG5 at some point is a 50 percent probability, and there is also a real and substantial possibility of his obtaining an AU3 position.

[301] The average of the MG5 and AU2 net pension loss calculations is $382,000 (rounded). The plaintiff seeks $350,000. I find that amount aligns with the probabilities already identified in terms of my findings on his likely career path.

[302] The plaintiff is awarded **$350,000** with respect to his net with-Accident pension loss.

VIII. Cost of Future Care

[303] The legal principles that must guide an award of damages for cost of future care were summarized in *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244:

> [244] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same or as narrow as "medically necessary";
- admissible evidence from medical professionals (doctors, nurses, occupational therapists, *et cetera*) can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts..... It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

[304] Dr. Cameron made no treatment recommendations.

[305] Dr. Finlayson made the following recommendations relevant to the plaintiff's claim:

a) headache management: a probable requirement for the foreseeable future (suggestion of different treatment options such as medications not yet trialed and Botox to temporarily reduce pain levels, in an attempt to institute better pain management); and

b) massage therapy: to temporarily reduce myofascial neck pain at the rate of once or twice a month and indefinitely.

[306] Dr. Fung made the following recommendations relevant to the plaintiff's claim:

a) vortioxetine: 10 milligrams daily to reduce his irritability and frustration, probably indefinitely; and

b) counseling: weekly sessions have proved helpful thus far and it would be reasonable to fund another 15–20 sessions.

[307] The plaintiff testified that he is regularly taking Trintrellix (vortioxetine) for his frustrations and anxiety regarding his TBI. He gave testimony regarding the cost.

[308] The plaintiff initially began seeing Dr. Keith Krull for psychological counselling in 2019, when he was looking to understand his cognitive deficits better and learn ways to cope with them. He stopped attending in 2022 because he was paying out of pocket and the counselling had moved from coping skills on to other matters. He testified that he intended to take further counselling on an "as needed" basis.

[309] The plaintiff testified that the massage therapy treatments he has taken since the First Accident are different from his pre-Accident joint pain massage therapy and are directed at the localized pain centred at the base of his skull. He testified that he would continue to attend massage therapy once or twice a month as recommended by Dr. Finlayson.

[310] The plaintiff testified that he had never seen a physiotherapist for his neck prior to the First Accident. He began going to a physiotherapist after the First Accident at the recommendation of Dr. Carlson and continued to attend thereafter as supported by Dr. Carlson and the physiotherapist. He said he went repeatedly because his neck pain kept bothering him and the physiotherapy provided some relief. The physiotherapy treatments were also focussed on the base of his skull and radiating neck pain. More recently, he has been attending physiotherapy by way of eight week blocks of weekly treatments, with breaks between the blocks, and stated that he was finding that this treatment approach helped. He intends to continue with the eight-week block schedule of physiotherapy treatments.

[311] The plaintiff's claim for ongoing costs of future care is as set out in the chart below and based on an assumed life expectancy of 80 years:

Treatment and Frequency	**Annual Cost**	**Multiplier (from CIVJI for 29 years)**	**Present Value (rounded)**
Trintrellix: 10 mg/day	$1,339 ($366.87/100 pills)	21.8444	$29,250
Physiotherapy: 24 sessions per year	$2,016 ($84/session)	21.8444	$44,038
Registered massage therapist: 6-12 sessions per year	$763– 1,526 ($127.15/session)	21.8444	$16,667 – $33,334
Psychological Counselling: 15-20 sessions	$2,550 – 3,400 ($170/session)	One time	$2,550 – $3,400
Mileage for physio and RMT	$78 – 94 ($2.60/round trip at $0.50/km)	21.8444	$1,704 – $2,053
Total			$94,209 – $112,075

[312] Dr. Fung specifically recommended the continuation of the Trintillex. The related claim for **$29,250** is allowed.

[313] An amount for psychological counselling is also warranted. Dr. Fung recommended counselling be available to assist the plaintiff in adjusting to his retirement and dealing with ongoing stress related to his injuries. The plaintiff was, however, already on “any occupation” long-term disability and had applied for

medical retirement when he was still seeing Dr. Krull. Therefore, I can assume that the plaintiff had at least some sessions in which he discussed dealing with his retirement and stress from his injuries. On that basis, the counselling will be primarily for ongoing stress and the cost is awarded at the low end of the range: **$2,550**.

[314] The claim for the registered massage therapy is supported by Dr. Finlayson, but does not account for the plaintiff's testimony that he would have gone five times a year in any event. The amount of **$20,000** is awarded.

[315] There is no recommendation from the medical experts for physiotherapy. Dr. Finlayson is the most relevant expert. She was aware that the plaintiff had had physiotherapy treatment in the past. She turned her mind to treatment of the plaintiff's myofascial neck pain and specifically recommended continued massage therapy. I am not satisfied that the evidence supports an award for physiotherapy.

[316] Given the above finding, I find **$500** to be a fair amount for mileage with regard to massage therapy.

[317] Accordingly, the total amount awarded for cost of future care is **$52,300**.

IX. Special Costs

[318] In his closing submissions, the plaintiff claimed $89,938 for special damages. That total includes a mileage claim for attending treatment in the amount of $3,740.10.

[319] In their closing submissions, the defendants agreed to the following special costs, totaling $55,955.46:

a) ABI Wellness (concussion program) - $6,092.10;

b) Keith Krull (psychologist) - $31,481.00;

c) Occupational therapy - $12,479.07;

d) Medication - $5,554.59;

e) Banking fee - $1.50; and

f) Mileage - $347.20.

[320] However, the defendants take issue with the plaintiff's claims relating to treatment for his neck pain, on the basis that his need for ongoing neck therapy existed prior to the First Accident. The defendant's neck-related objections relate to the following specific claims:

a) Langley Physio and Massage (massage therapy): $9,621.80;

b) Langley Physio and Massage (physiotherapy): $11,649.85;

c) Symmetry Injury Rehab (kinesiology): $4,382.19;

d) Sea to Sky Sports Physio (physiotherapy): $4,950;

e) The associated portions of the mileage claim.

[321] The law regarding special damages is as set out in *MacIntosh v. Davison*, 2013 BCSC 2264:

> [121] In his supplemental submissions filed on behalf of Mr. MacIntosh, Mr. Morishita referred to the following excerpts from the recent decision of Saunders J. in *Redl v. Sellin*, 2013 BCSC 58 [*Redl*]:
>
> > [55] Generally speaking, claims for special damages are subject only to the standard of reasonableness. However, as with claims for the cost of future care (see *Juraski v. Beek,* 2011 BCSC 982; *Milina v. Bartsch* (1985), 49 BCLR (2d) 33 (BCSC)), when a claimed expense has been incurred in relation to treatment aimed at promotion of a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness. I accept the argument expressed through Dr. Frobb, that a patient may be in the best position to assess her or his subjective need for palliative therapy. I also accept the plaintiff's counsel's argument that in the circumstances of any particular case, it may be possible for a plaintiff to establish that reasonable care equates with a very high standard of care. In the words of Prof. K. Cooper-Stephenson in *Personal Injury Damages in Canada,* (2d ed., 1996) at p. 166:
> >
> > > Even prior to the Supreme Court's endorsement of the restitution principle [in *Andrews v. Grand & Toy Alberta Ltd.* and *Arnold v. Teno*], in the area of special damages the courts

> had been prepared to allow optimum care, and damages were awarded for expenses of a character that stretched far beyond the resources of even an affluent Canadian.
>
> That being said, and while Dr. Frobb's paradigm of the patient becoming their own physician may have at least a superficial appeal, plaintiffs are not given *carte blanche* to undertake any and all therapies which they believe will make them feel good.

[122] In addition to *Redl*, Mr. Morishita referred me to the earlier decision of Powers J. in *Clark v. Kouba*, 2012 BCSC 1607 at para. 95 in which she observed:

> [95] A schedule of special damages set out the amounts with supporting receipts that were paid for and were pursued by Ms. Clark as a result of the accident. Although some of those expenses have not proven to be successful and are not now recommended by Dr. Armstrong, I accept that they were genuinely pursued and judged to be reasonably necessary by Ms. Clark and her treating physicians, in an attempt to obtain pain relief from the accident. I have also considered that some of the chiropractic and massage therapy pursued by Ms. Clark may have been required in any event as part of her running tune ups, as she was pursuing long distance running since the accident.
>
> …
>
> [127] Having reviewed all of the authorities to which I was referred, I have concluded that Saunders J.'s decision in *Redl* encapsulates the considerations which should bear upon the assessment of Mr. MacIntosh's special damages claims in this case.
>
> [128] In summary, I am satisfied that when assessing special damages the standard is the reasonableness of the expense claimed in the context of the injuries suffered. Medical justification for any expense is a factor to be considered, but not the only one. Subjective factors can also be considered including whether the plaintiff believed the treatments were reasonably necessary.

[322] As the defendants have conceded the amount of **$55,955.46**, I accept that that should be awarded toward special costs. I will deal with the disputed amounts.

[323] The plaintiff testified that the Sea to Sky Sports Physio treatments that are objected to by the defendants were taken as the second part of the ABI Wellness concussion program. On that basis, they were reasonably incurred as the concussion program itself was approved by his physicians and reasonably undertaken. The claim for **$4,950** is allowed.

[324] As above, I am satisfied the plaintiff suffered a myofascial neck injury in the First Accident that was subsequently aggravated in the Second and Third Accidents. His neck injuries from the Accident caused him localized and radiating pain, that is distinct from the general joint pain affecting his neck. Following the Accidents, the plaintiff had new neck pain of a different nature and in a different area, as well as the pre-existing joint pain affecting his neck.

[325] The plaintiff testified that, setting aside the ABI Wellness treatments already addressed, his massage therapy, physiotherapy and kinesiology attendances were all aimed at relief from his myofascial neck injury from the Accidents. He testified that Dr. Carlson referred him for all three treatments. He said he attended kinesiology for a period and that it was directed at trying to improve his weight training and running abilities, but that he stopped going because he did not find it helpful. He testified that massage therapy and physiotherapy did provide temporary relief from his neck pain and that is why he kept going.

[326] The plaintiff testified that the massage therapy and physiotherapy treatments he had after the Accident were focussed on the pain centred at the base of his skull and radiating out. I accept that the massage therapy treatments taken after the First Accident focussed on his myofascial injuries, but would also have been of assistance with respect to the joint pain he would have suffered in any event.

[327] The massage therapy treatments are allowed. The plaintiff went for 83 treatments between May 23, 2017 and December 14, 2021. These treatments were being taken no more frequently than Dr. Finlayson opined to be appropriate on a prospective basis. However, the plaintiff would have taken five massage therapy treatments per year (about 22 sessions in total) over the same period in any event of the Accidents. I will therefore deduct $2,500 to account for that, so the claim is allowed in the amount of **$7,121.80**.

[328] The plaintiff testified that the physiotherapy treatments provided him with some temporary relief, but also that he stopped taking them at times. I accept that Dr. Carlson did recommend that the plaintiff attend physiotherapy, but there is

nothing before me that indicates that Dr. Carlson was aware of the number and duration of the plaintiff's physiotherapy treatments. The plaintiff's claim for physiotherapy is based on having taken 149 sessions between June 15, 2017 and January 18, 2023. I conclude that that is not reasonable given the limited medical usefulness of the treatment and given that his physiotherapy treatment period significantly overlaps with his massage therapy and the ABI Wellness treatments. The plaintiff seeks $11,649. I will allow the claim to the extent of **$6,000.**

[329] The kinesiology treatments are allowed. Dr. Carlson recommended them. The plaintiff attended for a year and then concluded it was not helping. It was a reasonable treatment to try in his effort to recover and he attended for a period of a reasonable length before concluding it did not assist. The claim for **$4,382.19** is allowed.

[330] The plaintiff seeks $3740.10 in travel costs. Of that amount, $3218.50 relates to attendance at Langley Physio and Massage, which is where the plaintiff took both his massage therapy and physiotherapy treatments. That should be adjusted downward to account for my findings above. The claim for mileage is allowed to the extent of **$2,521**.

[331] Accordingly, the special costs claimed is allowed to the extent of **$80,930** in total (i.e., $55,955.46 + $4,950 + $7121.80 + $6,000 + $4,382.19 + $2,521).

X. Summary and Disposition

[332] The plaintiff is awarded the following under his damages claim:

Non-pecuniary Damages	$ 200,000
Past Loss of Earning Capacity (net)	$ 234,920
Future Loss of Earning Capacity	$ 1,190,000
Loss of Future Extended Benefits	$ 28,619
Loss of Pension Benefits	$ 350,000
Cost of Future Care	$ 52,300

Special Damages	$ 80,930
Total	**$ 2,136,769**

[333] The plaintiff is entitled to interest on the Special Damages.

[334] Unless there are other matters or settlement offers of which I am not aware, the plaintiff has been awarded damages and is entitled to his costs. If either of the parties wishes to advance an argument regarding costs, they must do so by filing written materials through the Registry within 30 days of this judgment, with the other party then having two weeks from date of filing to submit their response.

"Tucker J"