IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jacques v. Linford,*
2024 BCSC 1548

Date: 20240826
Docket: M220488
Registry: Vancouver

Between:

Paul Jacques

Plaintiff

And

Garfield Linford

Defendant

Before: The Honourable Justice J. Hughes

Reasons for Judgment

Counsel for the Plaintiff:	A.C.R. Parsons G. Hoff
Counsel for the Defendant:	C.G. Kelly
Place and Dates of Trial:	Vancouver, B.C. February 6-9, 12-13, 15, 26, 2024
Place and Date of Judgment:	Vancouver, B.C. August 26, 2024

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Overview

[1] This claim arises out of a May 2016 motor vehicle accident in which the plaintiff, Paul Jacques, was rear-ended at high speed while stopped at a red light on the Island Highway, in Nanaimo, British Columbia. Liability for the accident is admitted.

[2] As a result of the accident, Mr. Jacques suffered serious injuries which have significantly impacted his personal and professional life. He pursued treatment and rehabilitation in the years following the accident, but continues to deal with chronic pain, reduced functional capacity and psychological symptoms.

[3] In the months prior to the accident, Mr. Jacques had relocated to Salt Spring Island ("Salt Spring") and had started working as an excavation contractor. He intended to build an excavation contracting business and a life for himself and his daughter on Salt Spring. After the accident, Mr. Jacques attempted to return to work as an excavation contractor, but was unable to do so. He has not returned to the workforce in any meaningful capacity since the accident.

Background

[4] Mr. Jacques grew up in Powell River and has worked in a variety of physically demanding jobs since he was a teenager, including commercial fishing, heli-logging, and on a prawning boat.

[5] Shortly after graduating high school, Mr. Jacques had a daughter, Trinity Jacques. Mr. Jacques and his partner separated a few years later, but he remained involved in Trinity's life.

[6] Mr. Jacques has a Class 1 commercial trucking licence and worked as a commercial trucker. He eventually transitioned to operating heavy equipment, including dump trucks, skid steers and excavators.

[7] From approximately 2007 to 2010, Mr. Jacques worked for a friend at K&K Farms, building commercial blueberry farms. He operated heavy machinery and also

did some site management tasks. This work was seasonal and allowed him to have winters off. Mr. Jacques suffered a neck injury while working at K&K Farms and decided to take a year out of work to attend music school. Mr. Jacques' neck issues resolved within approximately 18 months, and he returned to work.

[8] In 2011, Mr. Jacques started working as an apprentice with a mining and excavating company on Salt Spring, Bradley Excavating. He realized that there was a lot of excavating work available on Salt Spring, and decided that he wanted to become an excavating contractor. He left Bradley Excavating because he was not getting paid enough and felt that he needed to build his skill set as a heavy equipment operator and save money to purchase machinery. Mr. Jacques then worked for Fireside Minerals in an open pit barite mine in the Yukon for approximately six months in 2012, where he drove trucks, excavators and loaders.

[9] In April 2013, Mr. Jacques began working as an independent subcontractor in the natural gas industry for SageLink Contracting ("SageLink") where he gained experience operating, repairing, and maintaining excavators. However, Mr. Jacques testified that he was often required to work in excess of 16-hour days doing safety-sensitive work and that this caused him concern because he understood working such long hours was contrary to the terms of his insurance, and could therefore leave him personally liable in the event of an accident.

[10] While at SageLink, Mr. Jacques worked 18 days on, 18 days off. When on duty, he lived in a work camp; when off-duty, he stayed at a friend's property on Salt Spring. This lowered his cost of living and allowed him to build some savings.

[11] In the summer of 2015, SageLink's operations slowed and Mr. Jacques decided to take the summer off to spend time with Trinity. Mr. Jacques returned to work for a time, but left SageLink in November 2015. He then moved to Salt Spring full-time with the intention of starting his own excavation business and having Trinity come live with him and attend school on the island.

[12] By early 2016, Mr. Jacques was working as an excavator operator on Salt Spring, mostly for his friend Ellis Hroch. Mr. Hroch operates an organic farm on Salt Spring and owns a large excavator, a skid steer and a dump truck. Mr. Hroch was an investor in a development project and was doing excavation work for that project.

[13] Mr. Jacques also had some of his own work, which he did using Mr. Hroch's machines, or by renting equipment from another contractor on the island, Ward Drummond. Mr. Jacques testified that by this point in time, he was at the "beginning stages" of building his excavation business. He and Mr. Hroch both testified that they were discussing going into business together, though their evidence suggests that these discussions were in the early stages.

The Accident and Plaintiff's Post-Accident Circumstances

[14] The accident occurred on May 17, 2016, at approximately 12:50 p.m. Mr. Jacques and Trinity were stopped at a red light when they were rear-ended at high speed by the defendant.

[15] The force of the impact was significant. Stephen Kuyten witnessed the accident and testified that it was like an explosion. Mr. Jacques' Jeep was instantly pushed 20–25 feet into the intersection, and there was debris everywhere.

[16] Mr. Jacques has limited memory of what transpired in the immediate aftermath of the accident. Trinity testified that he asked her if she was "ok", then slumped over the steering wheel. She thought he was dead. Mr. Kuyten approached Mr. Jacques' vehicle and observed that he appeared to be in and out of consciousness. First responders extricated Mr. Jacques from the vehicle and transported him to the Nanaimo Regional Hospital via ambulance for further assessment and treatment.

[17] When he arrived at the hospital, Mr. Jacques was experiencing a lot of pain in his neck, upper back and body, and had a headache. He also suffered a laceration to his head that required three to four stiches, which he believes was caused by a

hammer flying forward from under his seat on impact. Mr. Jacques was eventually discharged into his brother's care, and returned to Salt Spring the next day.

[18] Following the accident, Mr. Jacques continued to experience significant neck and upper back/shoulder pain. He could barely turn his head and the pain emanated down into his scapular region. He described the neck pain as relentless, occurring on a daily basis. Mr. Jacques saw his family doctor, Dr. Manya Sadouski, shortly after the accident who prescribed muscle relaxants, including cyclobenzaprine. Dr. Sadouski did not testify at trial.

[19] Mr. Jacques experienced headaches in the aftermath of the accident, which at times required him to rest for hours or a substantial part of the day. He also had difficulty sleeping; his pain woke him up at night and left him feeling exhausted.

[20] Starting in July 2016, Mr. Jacques began travelling to Victoria for physiotherapy at Synergy Health ("Synergy"). In November 2016, he started acupuncture and saw a kinesiologist to assist with his strength and mobility. Mr. Jacques found these treatments helpful and attended a multitude of physiotherapy, acupuncture and kinesiology sessions at Synergy from summer 2016 through October 2018.

[21] Mr. Jacques' ongoing pain also affected his mental health. He became anxious and depressed, and his mood issues in turn impeded his ability to function at times. He also stopped eating from time to time and his weight fluctuated massively. During this time frame, he withdrew from his social life and focussed extensively on attempting to rehabilitate his injuries and deal with his ongoing pain.

[22] In May 2017, Mr. Jacques began taking anti-anxiety and anti-depressant medication, but continued to struggle emotionally. In August 2017, he began seeing a counsellor on Salt Spring who he testified helped him deal with his depression.

[23] Also in May 2017, Mr. Jacques began seeing an occupational therapist in Victoria, who in turn referred him to Bruce Grey, an exercise therapist on Salt Spring. Mr. Jacques saw Mr. Grey for approximately one year, first on a bi-weekly basis then

weekly. Mr. Jacques found these treatments very beneficial in helping to manage his symptoms.

[24] Mr. Jacques and Trinity stayed on Salt Spring for approximately two years after the accident. However, in September 2018, Mr. Jacques' father had a stroke and he moved back to Powell River to help care for him. By this point, Mr. Jacques had not worked for over two years, and his savings were depleted to the point where he could no longer afford rent on Salt Spring.

[25] Upon relocating to Powell River, Mr. Jacques started seeing a chiropractor, Melanie Leblanc, at Suncoast Integrated Health ("Suncoast"). Mr. Jacques regularly obtained various forms of treatment at Suncoast, including physiotherapy and massage, until late November 2021.

[26] In October 2019, Mr. Jacques started trigger point therapy with Dr. Peter Hanson at the Denman Medical Centre in Vancouver. He described these treatments as attempting to break up the scar tissue in his shoulder and back, and found that they provided him with some benefit.

[27] In late summer or early fall 2020, Mr. Jacques began experiencing new pain at the junction between his neck and upper back, in an area that he testified had been consistently sore since the accident. This pain got progressively worse in late 2020 and into early 2021. In mid-February 2021, Mr. Jacques was attempting to throw a garbage bag into the back of his truck when he experienced immediate numbness in his neck, which radiated down into his left hand and fingers. He testified that this was a level of pain that he had never experienced before.

[28] Mr. Jacques attended at the Powell River Hospital where he was prescribed hydromorphone and underwent CT imaging. He also underwent a subsequent MRI, following which his care team determined that he needed surgery to repair the C6/C7 discs in his spine.

[29] In March 2021, Mr. Jacques had discectomy surgery performed by Dr. Abdurrazag Mutat. Mr. Jacques testified that he understood the C6/C7 disc at

bottom of his spine had ruptured and that Dr. Mutat fused his spinal bones together with a titanium plate and screws. Dr. Mutat did not testify at trial.

[30] Mr. Jacques' overall pain level worsened after the discectomy. He also suffered from significant headaches, which have since improved to the point where he now has about one bad headache per week.

[31] Mr. Jacques' living circumstances also deteriorated after his surgery. He was sleeping in an unfinished outbuilding on his father's property for a period of time and found this to be very draining and negatively impacted his mood. In 2022, he moved to Comox and by mid-year, was sleeping in a tent. Mr. Jacques then rented a cottage for a few months in the winter of 2022–2023. In the spring of 2023, he purchased a camper for the back of his truck and has lived in the camper since then.

[32] Throughout this time period, Mr. Jacques continued to struggle with pain and depressed mood. In November 2022, he started seeing a psychologist. However, due to his precarious financial circumstances and transient living situation, he struggled to continue other forms of treatment on a regular basis in the months leading up to trial, though he did manage to attend some massage therapy.

[33] Mr. Jacques testified that he was disengaged from society for a period of time in recent years, spending his time doing exercises and making music on his computer. However, approximately four months before trial, he returned to Salt Spring, where he currently lives in his camper on Mr. Hroch's farm.

[34] Mr. Jacques continues to deal with chronic pain, fatigue and pain in his neck and shoulder blades on a daily basis, all of which is aggravated with activity. He also has limited rotation in his neck and spine. He suffers from depressed mood and had suicidal thoughts at various times, most notably in 2017 and 2022. His mood remains low, and he experiences anxiety at times.

Credibility and Reliability

[35] As is often the case in claims of this nature, Mr. Jacques' credibility is a central consideration. The defendant accepts that Mr. Jacques is a credible person, but says that there are some aspects of his evidence that are not entirely reliable. Credibility and reliability are separate but related concepts; the former pertaining to veracity and the latter to accuracy: *Ford v. Lin*, 2022 BCCA 179 at para. 104; *Equustek Solutions Inc. v. Jack*, 2020 BCSC 793 at para. 109, citing *R. v. H.C.*, 2009 ONCA 56 at para. 41.

[36] The test of the truth of a witness's evidence is its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable within the applicable context: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 as cited in *A.G. v. Rivera*, 2024 BCSC 242 at para. 103; see also *Buttar v. Brennan*, 2012 BCSC 531 at para. 25, citing *Faryna* at 357. My assessment of the plaintiff's credibility is guided by the approach and factors for consideration as set out in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186–187, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013) and *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd*., 2019 BCSC 739 at para. 92, leave to appeal to SCC ref'd, 32946 (21 January 2021).

[37] Applying these principles, I find that Mr. Jacques was a credible and reliable witness. He testified in a careful and forthright manner, and his evidence was largely consistent with that of other witnesses, the objective documentary evidence, and his medical records.

[38] The defendant contends that I ought to reject Mr. Jacques' evidence that he had savings of $50,000 as an "unreliable" recent fabrication because this evidence was given for the first time at trial and Mr. Jacques failed to produce supporting banking documentation. In my view, this is not a question of reliability, but rather a direct attack on Mr. Jacques' credibility. In this respect, the defendant's position is inconsistent with his acceptance that Mr. Jacques is a credible man.

[39] The allegation of recent fabrication was not put to Mr. Jacques on cross-examination, and he therefore did not have the opportunity to respond. Nor do I accept the defendant's submission that the expert reports' failure to mention Mr. Jacques having savings suggests fabrication, particularly in the absence of any evidence showing Mr. Jacques was even asked about his savings. Mr. Jacques' tax returns indicate he earned approximately $176,000 from mid-2013 to mid-2015, and he testified that his living expenses during this time were low. He thus had the capacity to amass savings. His ability to fund his living and other expenses despite not working from May 2016 through to September 2018 also suggests he had savings to draw upon during this time frame.

[40] I therefore reject the defendant's contention that Mr. Jacques' evidence regarding his savings was a recent fabrication. I accept Mr. Jacques' evidence that as of May 2016, he had savings of approximately $50,000.

Expert Evidence

[41] Mr. Jacques tendered expert reports from: Dr. Kim Waspe, a physiatrist; Dr. John Pullyblank, a psychologist; Dr. Shaohua Lu, a psychiatrist; and Dr. Navraj Heran, a neurologist. He also tendered two functional capacity reports from Ms. Jacquelyn Abdel-Barr, and a report from an economist, Mr. Darren Benning.

[42] The defendant tendered a report from an economist, Mr. Mark Szekely, but did not tender any medical expert opinion evidence. Mr. Jacques' medical opinion evidence was therefore uncontradicted and, with the exception of Drs. Waspe and Heran's evidence about the causation of Mr. Jacques' March 2021 radiculopathy, largely undisputed.

[43] Having reviewed the physicians' expert reports and considered their *viva voce* testimony, I accept the opinions proffered by the plaintiff's physician experts as to the injuries he suffered from the accident, his current condition, and prognosis, as set out below.

Dr. Waspe—Physical Medicine and Rehabilitation

[44] Dr. Waspe is a physiatrist who was qualified to provide expert opinion evidence in the area of physical medicine and rehabilitation. Dr. Waspe opined that the plaintiff suffered the following injuries as a result of the accident: probable mild traumatic brain injury with brief exacerbation of familiar concussion phenomenon; whiplash associated disorder ("WAD") grade 2 with persistent and multifactorial cervicalgia; right long thoracic nerve injury; right periscapular and mid-back soft tissue pain; post-traumatic headaches, followed by musculoskeletal tension headaches; dyssomnia; mental health disfunction including major depressive disorder and anxiety features; and central sensitization alongside chronic pain.

[45] Dr. Waspe further opined that Mr. Jacques suffers from a degree of central sensitization and wind-up phenomenon as a result of the accident and will likely continue to struggle in this respect. Mr. Jacques now has a long-standing history of persistent diffuse cervical and upper back periscapular pain. Once established, this pain becomes a self-perpetuating phenomenon that makes non-painful stimuli unpleasant, which in turn becomes more difficult to eradicate. This impacts sleep initiation and restorative sleep outcome on pain management deleteriously, creating a vicious cycle. Dr. Waspe recommends Mr. Jacques to undertake intense active rehab to eradicate or prevent significant chronic changes.

[46] Dr. Waspe's prognosis for Mr. Jacques' cognitive improvement is poor. She opines that while matters have improved, his chronic pain, poor sleep and anxiety continues to impact his cognitive prowess. Given that these issues have not resolved seven years post-accident, the prognosis for general cognitive return to baseline is poor because ongoing confounders remain, specifically sleep derailments and pain.

[47] Dr. Waspe's prognosis for Mr. Jacques' WAD disorder was similarly guarded. She opined that he had experienced "no more than 50% improvement" and that this "is further compounded by the 2020-21 onset of cervical radiculopathy". She concluded that sedentary activities or maintained protracted forward stooped

activities contribute to Mr. Jacques' neck and upper back pain, with persistent reduction in his cervical range of motion. She therefore opined that given the protracted duration of Mr. Jacques' neck pain since the accident, he will continue to experience pain that it will worsen with the chronologic effects of aging.

Dr. Heran—Neurology

[48] Dr. Heran is a neurologist who was qualified to provide expert evidence in the area of neurosurgery. Dr. Heran diagnosed the plaintiff with the following injuries arising from the accident: myofascial injuries involving the neck and upper torso; mechanical neck pain arising from structural spinal elements at C6–7 level; long thoracic nerve injury resulting in right-sided scapular winging; and cervicogenic headaches. Dr. Heran noted that the plaintiff displayed features of depression as a consequence of chronic pain, functional limitations, social disruption and sleep impairment.

[49] In Dr. Heran's opinion, Mr. Jacques has likely plateaued in his recovery and recommended medical management by neuromodulating medication. Dr. Heran did not identify any specific treatments or interventions for Mr. Jacques, but recommended some additional imaging to identify potential "hot spots" that could be targeted with injections or further surgical management.

Dr. Lu—Psychiatry

[50] Dr. Lu is a psychiatrist who was qualified to provide opinion evidence in the area of psychiatry. Dr. Lu diagnosed the plaintiff with major depressive disorder with new onset of depressed mood and somatic symptom disorder ("SSD"). Dr. Lu opined that the plaintiff's physical pain has played a direct role in his continuing emotional issues, and that his inability to return to work following the 2021 radiculopathy surgery has caused psychological distress.

[51] Dr. Lu's prognosis is highly guarded on account of the duration and complexity of Mr. Jacques' chronic pain. Dr. Lu noted some stabilization of the plaintiff's mood, but considers him to remain at risk of greater disability on account of

his lack of stability and support. Dr. Lu further opined that his chronic pain is expected to have a "long-term negative impact on his future psychiatric symptoms". More specifically, Dr. Lu opined that:

> Mr. Jacques' long-term psychiatric risk is highly guarded. His chronic pain is unlikely to resolved [sic]. While he noted some stabilization of his mood with an acceptance of his pain and reduced capacity, he remains at risk of greater disability due to his lack of stability and support. He continues to meet the criteria for both major depression and SSD. Mr. Jacques has not had appropriate treatment for SSD and major depression. In part he worries about medication dependence. He has limited understanding of the interaction between his physical and psychological symptoms. Mr. Jacques has had chronic pain for more than five years. Chronic pain lasting for more than two years is unlikely to remit. At this point, his pain and physical symptoms pose a realistic risk. The uncertainties related to his work capacity perpetuate his health anxiety. Any worsening of his chronic pain or difficulties in returning to work will lead to a rapid deterioration of his major depression. His limited education needs to be considered in any vocational assessment. Despite some recent improvement, his major depression and SSD can still progress.
>
> …
>
> The duration and the complexity of Mr. Jacques' chronic pain is the primary reason for his guarded prognosis. Based on his current clinical course, as long as he has chronic physical conditions and the associated physical changes, he will have some fluctuating psychiatric symptoms. Mr. Jacques' mood and psychological symptoms will wax and wane with the severity of his pain and physical symptoms. His chronic pain will have a long-term negative impact on his future psychiatric trajectory. Pain lasting for more than two years rarely remits, Mr. Jacques is expected to have chronic physical symptoms indefinitely…

[52] Dr. Lu thus opined that even with optimal treatment, Mr. Jacques is likely to maintain some elements of depression due to his chronic pain. Even if he responds well to the treatment and his major depression achieves remission, he will still have at least a 30% chance of relapse within five years. Dr. Lu opined that it is unlikely Mr. Jacques will be free of mental health symptoms or chronic pain. Moreover, he is likely to have indefinite symptoms if he is not able to return to work. He is also at risk of developing Post Traumatic Stress Disorder and requires chronic monitoring of his mood and working capacity.

Dr. Pullyblank—Psychology and Vocational Rehabilitation

[53] Dr. Pullyblank is a psychologist and vocational rehabilitation consultant who was qualified to provide opinion evidence in those areas. Consistent with Dr. Lu, Dr. Pullyblank diagnosed the plaintiff with major depressive disorder and SSD. Based on his assessment and review of the plaintiff's medical records, Dr. Pullyblank opined that there is "strong support" for ongoing diagnoses of major depressive disorder and SSD, including the associated requirement for formal diagnosis of impairment in the plaintiff's day-to-day life.

[54] Dr. Pullyblank also conducted a vocational assessment of Mr. Jacques, the results of which are discussed below.

Causation

[55] The defendant accepts that the plaintiff suffered soft tissue injuries to his neck and upper back leading to chronic pain, concussion, depression and anxiety, injury to his right scapula, and nerve injury as a result of the accident. This is consistent with the uncontradicted medical evidence of Drs. Waspe, Heran, Lu and Pullyblank, and the plaintiff's evidence about the nature, severity and progression of his symptoms, along with the impact his injuries have had on his life.

[56] The evidence also establishes, and I find, that as a result of the accident, Mr. Jacques suffers from cervicogenic headaches, dyssomnia, as well as major depression and SSD with impairment to daily living.

[57] The main point of contention between the parties is whether the accident caused or contributed to the C7 radiculopathy that Mr. Jacques suffered in March 2021, five years after the accident. Mr. Jacques bears the onus of proving this on a balance of probabilities.

[58] The general test for causation is the "but for" test, which requires a plaintiff to show that the injury for which they seek compensation would not have occurred but for the defendant's tortious act: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13–14, 1996 CanLII 183. The defendant's negligence need only be a cause—not the

sole cause—of the plaintiff's injury, as noted in *Safdari v. Buckland,* 2020 BCSC 769:

> [105] The defendant's negligence need not be the sole cause of the injury, so long as it is part of the cause beyond the range of *de minimus*. The tortfeasor must take their victim as the tortfeasor finds the victim and is liable even if other causal factors for which the defendant is not responsible result in the victim's losses being more severe than they would be for the average person (also referred to as the thin-skull rule). At the same time, the tortfeasor need not put the victim in a better position than the victim would have been in and need not compensate the victim for the effects of a pre-existing condition that the victim would have experienced in any event. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; and *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
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> [106] The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
>
> [107] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:
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> > Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway.
> >
> > [citation omitted]

[59] I am mindful that the burden of proof lies with the plaintiff and that the defendant need not prove an alternate cause.

[60] With respect to causation of Mr. Jacques' C7 radiculopathy, Dr. Waspe opined that the accident "certainly would have contributed to a reduction in cervical function and paraspinal muscle condition", the latter of which "would be expected to adversely effect [sic] the capacity to offload the cervical spine and thus indirectly contribute to [Mr. Jacques'] propensity towards developing neural compromise down the road". Dr. Waspe opined that the mechanical and myofascial symptoms to Mr. Jacques' neck and upper back region that were noted following the accident were

likely present or potentially aggravated by the impact of the accident, but did not result in immediate radiculopathy.

[61] Dr. Waspe thus concluded that the delayed onset radiculopathy more likely than not indirectly contributed to the development of cervical decline:

> CT and x-ray imaging performed on the day of the accident confirmed no evidence of fracture, malalignment or concerning findings to account for his symptoms but did acknowledge a history of preexistent cervical dysfunction which follows a history of cervical pain managed by chiropractic manipulation in 2007. Mr. Jacques therefore had a pre-existent risk of for [sic] cervical dysfunction considering his history of multiple concussions, ball-headers as a high level soccer player and post-accident mechanical pain. I remain of the opinion the delayed onset of radiculopathy, 5 years post motor vehicle accident, more likely than not indirectly contributed to the development of cervical decline and potentially his radiculopathy. This is due to the fact that he had a pre-existent tenuous cervical spine when he was rear ended in tangential fashion.
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> [Emphasis added.]

[62] Dr. Heran also opined that the accident caused the plaintiff's 2021 left C7 radiculopathy. In this respect, he diagnosed the plaintiff with left C7 radiculopathy with chronic neuropathic changes, resulting from the C6–7 structural spinal injury:

> … The damage to the disc from the accident resulted in further deterioration and frank disc herniation, and the resultant left C7 radiculopathy.
>
> There are no pre-accident factors that influence this presentation.
>
> There are no post-accident factors that influence his current presentation either. He did have a transient episode of right-sided radiculopathy that since resolved.
>
> [Emphasis added.]

[63] Dr. Heran confirmed on cross-examination that the plaintiff presented with right neck pain radiating in the scapular area of the right shoulder after the accident, which he testified was typical of the onset of a C6–7 disc injury that progressed over time. In other words, the plaintiff's symptoms at the time of the accident were consistent with later onset of C7 radiculopathy.

[64] I accept Drs. Waspe and Heran's uncontradicted evidence on this point and find that it establishes the requisite substantial connection between the accident and

the C7 radiculopathy the plaintiff eventually suffered in 2021. I therefore find that Mr. Jacques has met his burden of establishing on a balance of probabilities that the accident caused or materially contributed to his C7 radiculopathy in 2021.

[65] The defendant submits that a 10% reduction should be made on the basis that Mr. Jacques' "degenerative back condition would have become disabling in the future as it had in the past". In support of this submission, the defendant relies on a reference in chiropractic records from 2007 suggesting that Mr. Jacques may have had a cervical disc injury, and Dr. Waspe's agreement on cross-examination that it is possible that someone with pre-existing degenerative changes could have a recurrence of symptoms.

[66] I do not find the defendant's submission compelling. Dr. Waspe was careful in her evidence to note that the reference to a disc herniation in her report was a recitation from Mr. Jacques of what a chiropractor had told him years prior. That evidence does not establish the fact of a diagnosis having been made. More importantly, Dr. Waspe stated in her report that she could not comment on the potential contribution of the 2007 injury given a lack of documentation and clinical evaluation at that time. Dr. Waspe's evidence therefore does not establish either the fact of Mr. Jacques having been diagnosed with a cervical injury in 2007, or that had he been diagnosed, the prior injury contributed to the C7 radiculopathy in 2021.

[67] I agree with the plaintiff that what is in effect being sought in this respect is a "crumbling skull" deduction, which imposes the burden on the defendant to prove a measurable risk that the degeneration in the plaintiff's neck would have detrimentally affected him regardless of the accident: *Dornan v. Silva*, 2021 BCCA 228 at para. 62; *Athey* at para. 36. The question is whether on the evidence, the risk is a real and substantial possibility, and if so, what is the relative likelihood of it occurring: *Dornan* at para. 64.

[68] I find that the defendant has not met his burden in either respect because the evidence does not establish that Mr. Jacques had a pre-existing degenerative condition, or that it would have affected him in any event of the accident. First, this

assertion is difficult to reconcile with Dr. Heran's uncontradicted opinion that "[t]here are no pre-accident factors that influence this presentation". Second, Mr. Jacques' self-report of what a chiropractor may have in turn told him by way of diagnosis is not admissible for the truth of that diagnosis when adduced in hearsay form through clinical records. Finally, Dr. Waspe's highly generalized opinion that this risk is "always" present for heavy equipment operators does not establish a measurable risk that Mr. Jacques' alleged pre-existing neck condition would have become active and disabling absent the accident.

[69] I therefore decline to make any reduction to the plaintiff's future damage award on the basis of a pre-existing condition.

Plaintiff's Functional Capacity and Prognosis for Return to Work

[70] It is uncontested that as a result of his injuries, Mr. Jacques is unable to return to his pre-accident work as a heavy equipment operator. Mr. Jacques says that he is completely and permanently disabled from being competitively employed in any capacity, while the defendant maintains that with treatment, Mr. Jacques remains capable of working in some capacity.

[71] The defendant asserts that his position is consistent with Ms. Abdel-Barr and Dr. Pullyblank's opinions. I disagree. While I have some concerns with whether Ms. Abdel-Barr's functional capacity evaluation accurately reflects Mr. Jacques' functional capacity, I have no such concerns with Dr. Pullyblank's uncontradicted opinion, which I accept, that Mr. Jacques is presently not competitively employable.

[72] Dr. Pullyblank conducted a vocational assessment for Mr. Jacques in January and October 2023, and concluded that he is presently unemployable and not a good candidate for vocational rehabilitation:

> In my opinion, Mr. Jacques is unemployable at his present level of functioning. Naturally, it would be hoped that Mr. Jacques might improve in response to treatment, particularly given his history of vigorous participation in physical rehabilitation. However, in my opinion, he will be difficult to treat given how highly entrenched he is in obtaining further surgery, his intense focus on his pain, his high level of distress and anger, and his strong

> continuing focus on his past achievements and earnings as a Heavy Equipment Operator.
>
> Mr. Jacques is currently living a marginal existence and given his barriers, and particularly his high pain disability perception, SSD, and focus on surgery, it is my opinion that he is not presently a good candidate for vocational rehabilitation. For the future, it is unclear whether he is a candidate for the surgery he wants, whether he can obtain it, and if he does, what his recovery might look like, including any emotional recovery.
>
> [Emphasis added.]

[73] Dr. Pullyblank identified Mr. Jacques' pain and physical limitations, depression and SSD, and ambiguous suitability for retraining as barriers to employment. He recognized that Mr. Jacques has a strong intellect and that he may become more employable with treatment, but said it was unclear to what degree. Dr. Pullyblank's prognosis for retraining regardless of Mr. Jacques' strong intellect was highly guarded because he was "consumed with a focus on physical cures for his situation and was not engaged in considering retraining options". Dr. Pullyblank noted that while unfortunate, this was consistent with the nature of SSD.

[74] Dr. Pullyblank's opinion was that given his current constellation of employment barriers, Mr. Jacques' prognosis for obtaining sustainable employment is poor. This is consistent with Dr. Heran's opinion that Mr. Jacques is fully disabled from working in his pre-accident role, and while he could potentially do some clerical or customer services duties, like his DJ activities, they could only be done on "intermittently, and definitely not on a sustained basis".

[75] Ms. Abdel-Barr is an occupational therapist, certified life care planner, and functional capacity evaluator who was qualified to provide opinion evidence in the areas of occupational therapy and life care planning. She conducted a functional capacity assessment for Mr. Jacques in September 2023 and concluded that Mr. Jacques is not competitively employable in his previous or alternative professions in a full-time capacity.

[76] More specifically, Ms. Abdel-Barr opined that Mr. Jacques does not have the capacity to meet the full physical demands to work in his pre-accident job as a heavy

equipment operator, or in the music industry as a DJ, which she noted he also did from time to time as a "side hustle". In Ms. Abdel-Barr's opinion, Mr. Jacques is not competitively employable in a full-time capacity within the open job market as a private contractor or employee because of his neck, shoulder and upper back pain. and increased pain responses, fatigue and changes in mood.

[77] Ms. Abdel-Barr also opined that if Mr. Jacques is better able to manage his pain experience and psychological issues, he may be able to work in the music industry "in a part-time, accommodated and supported workplace with limited expectations related to prolonged positioning and postures". This would require reduced or part-time work with employer support allowing him to pass on work that cannot be completed, have limited tasks and flexible deadlines, accommodation for taking time off during the work week for rest and recovery, and ergonomic work stations with the ability to change position frequently.

[78] The defendant takes issue with Ms. Abdel-Barr's testing process, asserting that she required the plaintiff to do repetitive exercises that may have impacted on the subsequent strength testing and results. I accept that this may have been the case in a limited respect and thus find that Ms. Abdel-Barr's assessment may underestimate the plaintiff's functional capacity, though not to the extent suggested by the defendant, or to the point where I must reject her evidence in its entirety. I accept Ms. Abdel-Barr's opinion that Mr. Jacques is unable to return to his previous employment and has very limited prospects of future employment, which prospects are conditional on improvement in and better management of his pain and mood symptoms.

[79] That being said, I prefer and give greater weight to Dr. Pullyblank's opinion because he considers the difficulties that arise in treating Mr. Jacques on account of, among other factors, how entrenched he is in obtaining further surgery and intense focus on his pain.

[80] While there may be some modest prospect for improvement with further treatment, Mr. Jacques' prognosis as a whole is guarded. He is unlikely to ever be

pain-free again. The goal of future treatment at this stage is not curative, but rather to improve his ability to function.

[81] In the result, I find that Mr. Jacques is presently unemployable and is not a good candidate for vocational rehabilitation. His prospects of obtaining sustainable employment in the future are thus poor.

Mitigation

[82] The defendant asserts that a 10% reduction should be applied for failure to mitigate because Mr. Jacques did not attend a chronic pain program when recommended in 2018, and failed to undertake sufficient rehabilitation or treatment in the three years following the March 2021 discectomy.

[83] To establish a failure to mitigate, the defendant bears the onus of proving on a balance of probabilities that: (a) the plaintiff acted unreasonably in eschewing the recommended treatment; and (b) that the plaintiff's damages would have been reduced to some degree had he acted reasonably: *Haug v. Funk*, 2023 BCCA 110 at para. 61; *Chiu v. Chiu*, 2002 BCCA 618 at para. 57; *Murphy v. Snippa*, 2024 BCCA 30 at paras. 93–94. Only once these two criteria have been established does the Court then assess the extent to which the plaintiff's injuries would have been reduced had he not failed in his duty to mitigate: *Haug* at para. 61.

[84] In July 2018, Mr. Jacques attended a three-day session at a pain clinic in Victoria. He was advised that he would benefit from attending a six-week in-patient pain program in Victoria. The program cost approximately $10,000 and would have required him to relocate to Victoria for the duration of the program. The plaintiff testified that the cost was prohibitive, and he did not want to relocate because Trinity was living with him on Salt Spring at the time. I accept Mr. Jacques' evidence regarding why he did not attend the six-week pain program in 2018 and find that he did not act unreasonably in that respect.

[85] Even if Mr. Jacques had acted unreasonably, the defendant has not established on a balance of probabilities that Mr. Jacques' symptoms would have

improved had he attended at pain clinic in 2018 or sought additional treatment following his 2021 discectomy. Dr. Waspe's evidence that it was "possible" the plaintiff's symptoms would have improved is insufficient to meet the defendant's burden in this respect. Nor does the evidence establish that any particular treatments were recommended following the 2021 discectomy surgery, or that had Mr. Jacques undertook a particular treatment, his condition would have improved so as to warrant a reduction in his damages. In any event, the plaintiff undertook massage therapy, chiropractic treatments and trigger point injections from April 2021 through March 2022, and again from December 2022 to May 2023.

[86] Accordingly, I conclude that the defendant has not met his burden of proving that the plaintiff failed to mitigate his losses and decline to apply any reduction in this respect.

Non-Pecuniary Damages

[87] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, disability, and loss of enjoyment of life. Non-pecuniary loss must be assessed for both losses suffered by the plaintiff to the date of trial and those they will likely suffer in the future: *Tisalona v. Easton*, 2017 BCCA 272 at para. 39. The well-known factors that influence an award of non-pecuniary damages are set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC ref'd, 31373 (19 October 2006).

[88] An award of non-pecuniary damages must be fair and reasonable to each party, with fairness measured in part against awards made in comparable cases, though each case is decided on its own facts: *Rattan v. Li*, 2022 BCSC 648 at para. 124. The amount of the award depends on the seriousness of the injury considered in the context of the specific plaintiff's circumstances: *Tisalona* at para. 39.

[89] The plaintiff seeks an award of $275,000, relying on *Grabovac v. Fazio,* 2021 BCSC 2362, and *Moges v. Sanderson*, 2020 BCSC 1511. The defendant submits that the appropriate award for non-pecuniary damages in the plaintiff's case falls in

the range of $170,000–$200,000, relying on *Xu v. Balaski*, 2020 BCSC 940, and *Raedwulf v. Kelly*, 2020 BCSC 915.

[90] I do not find the defendant's cases reflective of the present circumstances, most notably because unlike Mr. Jacques, the plaintiffs in *Xu* and *Raedwulf* were both able to return to work in some capacity. I also find *Grabovac* distinguishable because the fact that the plaintiff was left with no realistic prospect of having children was a significant factor in quantifying the appropriate award: paras. 250–251.

[91] Both parties also rely on *Gill v. Apeldoorn*, 2019 BCSC 798. Mr. Jacques says *Gill* represents the low end of any appropriate range of non-pecuniary damages, while the defendant says that it falls at high end of the range. In *Gill*, the plaintiff was 44 years old at the time of the accident. He suffered soft tissue injuries to his neck, back and shoulder in the accident and developed chronic pain, major depression, anxiety and PTSD. Like Mr. Jacques, the plaintiff in *Gill* was unable to return to work, and the medical experts were guarded about his prognosis for recovery or return to work. Justice Gropper noted that the plaintiff's psychological condition had resulted in suicidal ideation and had a devastating impact on every aspect of his life. The Court assessed non-pecuniary damages at $200,000 ($232,000 adjusted for inflation).

[92] I find that *Moges* and *Gill* are the most helpful as comparator cases as they concerned plaintiffs with similar injuries and symptoms that resulted in significant impacts to their lives. Mr. Jacques was relatively young when the accident occurred, and the physical and psychological injuries he suffered have had a profound impact on nearly every aspect of his life. Prior to the accident, Mr. Jacques was an active, able-bodied person capable of doing physically demanding work. He was looking forward to establishing a business and building a life for himself and Trinity on Salt Spring. He now finds himself caught in a cycle of chronic pain and depression that has left him unable to work in his chosen profession nor participate in activities he used to enjoy.

[93] The ongoing sequelae of Mr. Jacques' injuries from the accident have also detrimentally impacted his ability to care for Trinity when she was younger and their current relationship. Mr. Jacques planned to have Trinity live with him on Salt Spring and was motivated to build a life there with her. He still attempted to do so after the accident, but struggled in this respect. Both Mr. Jacques and Trinity eventually ended up moving back to Powell River, and Mr. Jacques testified that the move strained their relationship.

[94] Considering my findings regarding Mr. Jacques' circumstances, the nature and extent of his injuries, the *Stapley* factors, and the cases cited by the parties (in particular *Moges* and *Gill*), I am satisfied that an award of $225,000 is necessary to appropriately compensate him for his pain and suffering and loss of past and future enjoyment of life.

Loss of Earning Capacity

[95] In assessing past and future loss of earning capacity, the Court considers the impact of the accident on the plaintiff by comparing pre- and post-accident scenarios. This requires an analysis and comparison of past and future hypothetical events, assessed on a standard of real and substantial possibility and weighed on the basis of the relative likelihood of the event occurring, all of which must be rooted in the evidence: *Tigas v. Close*, 2024 BCCA 223 at para. 21, citing *Rab v. Prescott*, 2021 BCCA 345 at para. 47.

[96] Hypothetical events are given weight according to their relative likelihood, and will be taken into consideration as long as there is a real and substantial possibility of the event occurring, not mere speculation: *Dornan* at paras. 63–64, citing *Grewal v. Naumann*, 2017 BCCA 158 at para. 48 and *Athey* at para. 27.

[97] Damages for loss of past and future earning capacity are assessed, not calculated: *Ibbitson v. Cooper,* 2012 BCCA 249 at para. 19. The court must assess what would most likely have occurred, and the existence of real and substantial possibilities that the circumstances may have turned out differently: *Colgrove v. Sandberg,* 2022 BCSC 671 at para. 97. Contingencies must be considered and can

be positive or negative. They include both general contingencies that arise as a matter of human experience and specific contingencies that—as established by the evidence—are particularly likely to arise in the circumstances of the case: *Steinlauf v. Deol*, 2022 BCCA 96 at paras. 86–91.

[98] If a plaintiff or defendant relies on a specific contingency, positive or negative, they must be able to point to evidence that supports an allowance for that contingency. General contingencies are less susceptible to proof: *Rattan* at para. 147. Accordingly, while the court may adjust an award to give effect to general contingencies, even in the absence of evidence specific to the plaintiff, such an adjustment should be modest: *Steinlauf* at para. 91.

[99] At the final stage of the damage assessment process, the court must determine whether the damage award is fair and reasonable: *Lo v. Vos*, 2021 BCCA 421 at para. 117.

[100] Mr. Jacques seeks an award of $886,000 (net) for pre-trial loss of earning capacity, and $4,689,000 for loss of future earning capacity on the basis that absent the accident, he would have established his own excavation contracting business on Salt Spring, eventually earning on average $225,000 per year until retirement at age 70. This scenario is predicated on Mr. Jacques working as an owner/operator, purchasing one excavator, leasing a second, and having two additional operators work for him.

[101] The defendant says the appropriate award is $371,000 (net) for pre-trial loss of earning capacity, and award of approximately $800,000 for loss of future earning capacity. The defendant’s position is predicated on Mr. Jacques continuing to work as an excavation contractor earning $80,000 per year to retirement at age 65. The defendant’s scenario is based on Mr. Jacques’ annualized 2016 earnings adjusted for inflation, which roughly approximates to him working on average approximately 2,000 hours per year at a discounted rate of $30 per hour.

Excavation Contracting on Salt Spring

[102] The analysis of past and future hypothetical events and applicable contingencies by comparison of pre- and post-accident scenarios in this case turns in large measure on the likelihood of Mr. Jacques building a successful excavation business on Salt Spring. Mr. Jacques testified about working as an excavation contractor on the island, and also called Mr. Hroch and another excavation contractor—Charles Gosset—as fact witnesses to testify about their experience working as excavation contractors in Salt Spring.

[103] Mr. Jacques began working as an excavator operator on Salt Spring in December 2015 and did so until the accident occurred in May 2016. He earned $40–50 per hour when working his own jobs with Mr. Hroch's equipment, and $30 per hour while working for Mr. Hroch using Mr. Hroch's equipment. Mr. Jacques worked for Mr. Hroch at a discounted rate because he had access to Mr. Hroch's equipment at a discounted rate to do his own jobs.

[104] Prior to the accident, Mr. Jacques was helping Mr. Hroch with excavation on one of his projects, and they had discussed going into business together. Their intention was that Mr. Jacques would operate Mr. Hroch's machines, and purchase additional excavators that complemented Mr. Hroch's equipment so that they could then "tag team" jobs. Mr. Jacques testified that he intended to purchase a 35 mini excavator and a 75 mid-size excavator to complement Mr. Hroch's existing machines.

[105] Mr. Gosset has lived on Salt Spring for 30 years and has owned and operated an excavation business on the island for 20 years. Mr. Gosset's business is one of the largest on the island: he employs five to six skilled machine operators, two truck driver/labourers, a bookkeeper and an office manager. There are two or three companies of this size on the island, and about 10 smaller companies.

[106] Mr. Gosset's clients are contractors and commercial developers who contract him to do site excavation. He testified that excavation work is billed by the hour, and commercial jobs are obtained through fixed bids. In addition to his own operators,

Mr. Gosset also hires operators who have their own machines, in which circumstances, he charges a portion of the machine's hourly operating structure, but allows the operator to keep a majority of their fees. Mr. Gosset also constructs septic fields, charging $35,000 to $50,000 per field and earning a 30% profit on this type of work.

[107] Mr. Gosset testified that he earned $200,000 to $300,000 annually with three to four machines and three to five employees/operators working for him. In his experience, once he had three to four operators working for him, he was earning approximately $50,000 per machine. Mr. Gosset's earnings have now maxed out at $400,000 to $500,000. It is unclear whether Mr. Gosset's figures were gross or net, what his expenses or profit margins were for excavation work, and whether they remained consistent over the years. Mr. Gosset also gave evidence about how he built his business, acquired machines, how long machines last, and how much he has historically paid for insurance and currently pays for WorkSafe BC premiums.

[108] Both Mr. Hroch and Mr. Gosset also provided evidence about demand for excavation work on Salt Spring. Mr. Hroch testified that there was "lots" of work available. Mr. Gosset said that demand has been "non-stop" since he started his business twenty years ago, excavation work is year-round, and he has never had a slow period. Mr. Gosset's biggest challenge is finding and retaining operators to work for him—it is very difficult to hire operators from off-island because accommodation on Salt Spring is a scarce resource.

[109] The defendant takes issue with the admissibility of Mr. Gosset's evidence, arguing that it constitutes inadmissible lay opinion evidence. The plaintiff says this evidence is admissible because the point of Mr. Gosset's testimony is to provide evidence about the niche market on Salt Spring, the availability of work, rates of pay, cost of machinery and availability of financing, not to provide opinion evidence or make a straight comparison to the plaintiff's potential hypothetical circumstances.

[110] Opinion evidence is generally inadmissible from lay witnesses, but may be admissible under the compendious statement of fact exception where the evidence

consists of everyday inferences drawn from observed facts which the witness was in a better position to make than the trier of fact: *American Creek Resources Ltd. v. Teuton Resources Corp*., 2013 BCSC 1042 at paras. 14, 16, 18 [*American Creek*]. Opinion evidence is not, however, admissible under this exception where it concerns matters of specialized, technical expertise upon which the witness proposes to testify with reference to their own experience: *American Creek at* para. 18.

[111] In my view, the defendant's objection is well taken given the manner in which Mr. Jacques relies on Mr. Gosset's evidence, namely to establish a real and substantial possibility that but for the accident, Mr. Jacques would have successfully established a profitable excavation business on Salt Spring and had earnings in the same range as Mr. Gosset's. This is evidenced by, for example, Mr. Jacques' submission that he could have earned close to $200,000 from his own time operating his own excavator, plus an additional $50,000 per year from two operators for earnings of $200,000 to $300,000 "just as Mr. Gosset testified he did", and by his reliance on a "rule of thumb" that an excavation contractor can earn roughly $50,000 per operator per year. Mr. Gosset testified that that is approximately what he earned per operator, but that evidence cannot be extrapolated beyond Mr. Gosset's personal circumstances and relied on as applicable to the industry as a whole, as Mr. Jacques seeks to do.

[112] When relied on in this fashion, Mr. Gosset's evidence strays into inadmissible lay opinion evidence, particularly to the extent that Mr. Jacques seeks to extrapolate Mr. Gosset's earnings or profit margins to the Salt Spring market more generally—i.e. in asserting that as a general "rule of thumb" an operator generates $50,000 per year in income. In providing this evidence, Mr. Gosset drew on his specialized expertise gained from 20 years working as an excavation contractor on Salt Spring. By consequence, Mr. Gosset's opinions are not admissible under the compendious statement of fact exception, and his evidence as a fact witness cannot be used in place of opinion evidence tendered from a properly qualified expert opinion evidence. None of the witnesses who testified were so qualified. Dr. Pullybank was

qualified as an expert, but testified that he was unable to estimate what Mr. Jacques earnings would have been from operating his own excavation business.

[113] Further and in any event, Mr. Gosset's evidence is of limited assistance in assessing the potential costs and expenses that Mr. Jacques would have faced in starting an excavation business in the years following the accident. Mr. Gosset's evidence about how he grew his business and his earnings over the years as an experienced owner/operator of one of the largest excavation and septic companies on Salt Spring is not particularly helpful in hypothesizing about Mr. Jacques' potential future earning capacity as a newer, smaller participant in the market. Mr. Gosset's evidence was general in nature, dated in some respects, and specific to his particular circumstances. While I do not doubt the truthfulness of Mr. Gosset's evidence, it was not corroborated by his own financial statements or by any reliable industry or occupational data: see e.g. *Moen v. Grantham*, 2024 BCSC 937 at para. 275. Mr. Gosset's evidence is, in my view, similar to that which was rejected in *Sekhon v. Cruz*, 2023 BCSC 319, at para. 149.

[114] That said, I accept Mr. Gosset's evidence regarding the prevailing pay rates for excavation contractors on Salt Spring and his evidence that steady work is available for excavation contractors on island. His evidence in this respect is consistent with Mr. Hroch's and the plaintiff's. Based on their evidence, I find that:

a) there were 10-12 other excavation contracting companies operating on Salt Spring of various sizes;

b) excavator operators on Salt Spring were paid between $30–55 an hour depending on skill level and size of machine, and that the top rate was $65 in 2024;

c) rates for excavation work varied by size of machine: $100–110 per hour for a mini 35 excavator, $120–130 per hours for a mid-size 75 excavator, $140–150 per hour for a large 140 excavator, and $170 per hour for an extra-large 200 excavator;

d) as a skilled operator with strong mechanical skills and a Class 1 driver's licence, Mr. Jacques would have commanded a rate at the higher end of this range;

e) the $30 an hour rate Mr. Jacques was charging Mr. Hroch was a discounted rate and not reflective of the market rate for operators with Mr. Jacques' skill set; and

f) work was consistently available for excavator operators working on Salt Spring.

Past Loss of Earning Capacity

[115] Compensation for past loss of earning capacity is based on what a plaintiff would have—not could have—earned but for the accident-related injuries: *Sekhon* at para. 78, citing *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. Awards for past economic loss arising from a motor vehicle accident are determined on an after-tax basis: *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, ss. 95, 98.

[116] The plaintiff submits that absent the accident, he would have established a successful excavation contracting business and earned on average $100,000 per year for 2016 to 2018, then on average $200,000 per year from 2020 to 2023 for a total pre-trial loss of earning capacity of $1,100,000. He claims $886,000 net of taxes, but does not specify what deduction or tax rate is applied to achieve this net number.

[117] The defendant says that Mr. Jacques' pre-trial earnings would have been approximately $80,000 per year absent the accident, noting that his actual earnings for 2016 do not support this amount and that his highest ever pre-accident T4 earnings were $92,000 in 2014. The defendant also notes the lack of evidence suggesting that the plaintiff had sufficient work of his own—separate from Mr. Hroch's project—to support earnings at the levels claimed.

Pre-trial Without Accident Earning Capacity

[118] Mr. Jacques' receipts were lost in the accident and, accordingly, there is minimal evidence as to what proportion of his pre-accident work was his own as opposed to work he was doing for or through Mr. Hroch's and his contacts. However, the parties accept that Mr. Jacques' actual gross income in 2016 was $26,203, and that had he continued to work at the same pace for the balance of the year, he would have earned approximately $56,000.

[119] I accept Mr. Jacques' evidence that excavation work would have picked up over the course of the spring and summer 2016 such that his annualized earnings would have exceeded $56,000. However, it also follows that work may have slowed down again later in the fall and winter.

[120] I am satisfied that there is a real and substantial possibility that through a combination of his own work and work for others (whether for Mr. Hroch or other excavating contractors on the island), Mr. Jacques would have had work approximating 2,000 hours annually available to him. I am also satisfied that over the course of the pre-trial period (June 2016 to February 2024) he would have shifted into doing more of his own work as he built a reputation for himself on Salt Spring, but still would have had to rely on other contractors for some portion of his work.

[121] Mr. Jacques testified that he intended to purchase a mini 35 excavator outright from Mr. Drummond for approximately $35,000. The timing of this purchase was unclear; however, I accept that Mr. Jacques had sufficient savings to purchase a mini excavator and find a real and substantial possibility that he would have done so by the end of 2017. Beyond that, Mr. Jacques' evidence about his discussions with Mr. Drummond lacked specificity. Mr. Drummond did not testify.

[122] Mr. Jacques also testified that he intended to finance the purchase of a mid-size 75 excavator, and pay it off within a year. The evidence does not support a real and substantial possibility of this occurring. Mr. Jacques admitted in cross-examination that at the time of the accident, he had not yet "worked out a deal" with Mr. Drummond, discussed vendor take-back financing with him, or applied for third

party financing. Nor is there evidence establishing the purchase price, leasing and carrying costs, or profitability net of operating expenses. I therefore find the prospect of Mr. Jacques purchasing an additional larger excavator is largely aspirational and speculative on the evidence before me. I also consider Mr. Jacques' assertion that he would have paid off a second machine within a year to be purely speculative.

[123] With respect to his earning capacity as owner/operator, Mr. Jacques' position is predicated on an hourly machine rate of $150, split into thirds between owner, operator and machine costs. On Mr. Jacques' own evidence, the rate of $150 per hour applies to large 140 excavators, not the mini 35 and mid-size 75 machines that he intended to purchase. The rates for those machines were lower: $100–110 and $120–130 per hour respectively. The $150 per hour rate Mr. Jacques uses thus potentially overestimates his loss of earning capacity as an owner/operator because he was not intending to purchase a 140 excavator. I therefore find that his likely hypothetical earning capacity as owner/operator would have been in the range of $65-85 per hour given the applicable rates for the size of excavators he said he intended to purchase. This results in earning capacity in the range of $130,000 to $170,000 annually assuming he worked full time (approximately 2,000 hours per year) as an owner/operator.

[124] With respect to his earning capacity as an operator, Mr. Jacques charged a discounted rate of $30 per hour when working on Mr. Hroch's jobs using Mr. Hroch's equipment. However, he earned $40-50 per hour doing his own jobs using Mr. Hroch's machines, and the evidence establishes that the rate for an operator on a larger 140 excavator was approximately $50 an hour. This suggests that Mr. Jacques' best-case scenario for the pre-trial period would have been earning capacity in the range of $60,000 to $100,000 annually if he worked full time as an operator.

[125] The positive and negative contingencies that may arise during the pre-trial period must also be considered in assessing Mr. Jacques' hypothetical pre-trial

without accident earning capacity. I find the following positive contingencies apply to Mr. Jacques:

a) He was a highly skilled operator who had the ability to do detailed grading work. He had his Class 1 driver's licence which would have allowed him to do additional types of work, such as moving heavy equipment and driving dump trucks. These skills may have allowed him to charge higher rates than other lesser-skilled operators;

b) He had some administration and management experience from his work with K&K Farms and SageLink that would assist him in establishing himself as an excavation contractor. However, I do not find that his experience was as extensive as he suggests or that he had the managerial experience necessary to manage an excavation business with multiple employees or of similar scale and scope to Mr. Gosset's business;

c) There may have been more than 2,000 hours of work available to Mr. Jacques per year, and the possibility of more lucrative overtime work; and

d) Rates for operators generally, and for those with Mr. Jacques' skills specifically, are also likely to have increased over time. Indeed, Mr. Gosset testified that he intended to increase his rates in the near future.

[126] However, there are also negative contingencies that come into play, which I find include the following:

a) Mr. Jacques may not have had 2,000 hours of work available to him, either as operator or owner/operator, and his business may have failed entirely, a risk both economists agreed that many new businesses face;

b) Mr. Jacques may not have been able to work 2,000 hours annually on machine on account of down time when equipment may require repair or

maintenance, time required for administrative tasks, or time devoted to family responsibilities;

c) The work available to Mr. Jacques may have been more heavily weighted to smaller excavation projects or machines which were less profitable on an hourly basis;

d) Mr. Jacques may not have had the financial means to purchase or lease additional excavators, or the cost of financing and operating his machines may have been such that hourly rates were not as profitable as expected; and

e) Considering Mr. Gosset's evidence about the difficulties he has had finding and retaining operators, there is a significant possibility that Mr. Jacques would not have been able to find or retain additional operators to work for him, which would limit his ability to grow his business beyond his own capacity as owner/operator.

[127] I also find that Mr. Jacques demonstrated a somewhat weak attachment to the workforce in the years leading up to the accident, which in turn suggests that he may have worked less than full time hours each year. In this respect, his work with K&K Farms was seasonal: he had winters off and worked roughly six months of the year for three out of the four years he was employed there. He then worked somewhat intermittently in the Yukon in 2012 and 2013, with time off work from November 2012 to April 2013. Even once he began working as an excavation contractor on Salt Spring, Mr. Jacques testified that his work was weather dependent and project-based, so he did not have work every day.

[128] Mr. Jacques' pre-trial income as set out in his tax returns is also consistent with intermittent work and a limited attachment to the workforce. Other than 2014, when he earned $92,000 working a full year for SageLink, the plaintiff's income appears more consistent with something less than full-time work. He earned $36,111

in 2013, $45,824 in 2015 and $20,844 from January to mid-May in 2016 when the accident occurred.

[129] Finally, the onset of the COVID-19 pandemic also gives rise to a potential negative contingency in terms of lack of available work in 2020 and for a period of time thereafter. While Mr. Gosset testified that it was not the case for his company, I do not accept that his experience is transferrable to all excavation contractors on Salt Spring. I find it appropriate to factor in a negative contingency for a slowdown in business over the course of the pandemic, particularly because the plaintiff would have been a relatively newer, smaller operator in a niche market at the time.

[130] Considering both the positive and negative contingencies and applying them to the potential scenarios that arise for Mr. Jacques working as an operator or owner/operator and on different sizes of excavators, I assess Mr. Jacques' pre-trial without accident earning capacity as follows: $47,000 for 2016 net of his pre-accident earnings; $70,000 for 2017; $80,000 for 2018 to 2020; and $100,000 on average for 2021 to 2023. Accordingly, I assess Mr. Jacques' without accident pre-trial earning capacity at approximately $657,000.

Pre-trial With Accident Earning Capacity

[131] Mr. Jacques had no income in 2017. In 2018, he did some limited work for Mr. Hroch as an excavator operator, and basic yard work for another client. After returning to Powell River in September 2018, Mr. Jacques did a small amount of excavator and sound work, and was paid for assisting with his father's care. He had a gross business income of $3,259 in 2018 and $5,803 in 2019.

[132] Mr. Jacques received CERB benefits of $18,000 in 2020 and $20,000 in 2021. He had no income in 2022 or 2023. Mr. Jacques thus had income and benefits of approximately $47,000 over the pre-trial period.

[133] Subtracting Mr. Jacques' actual earnings from his hypothetical without accident earnings and rounding, I assess his gross loss of past earning capacity at $610,000.

[134] I leave it to the parties to calculate Mr. Jacques' after-tax loss and resulting damages payable. I do not accept the defendant's submission that I should simply apply a 20% discount to adjust for income tax because that submission lacks a basis in the evidence.

Future Loss of Earning Capacity

[135] Assessing loss of future earning capacity involves a comparison between the likely future earnings of the plaintiff if the accident had not happened and the plaintiff's likely future earnings after the accident. The central task for the court is to compare the plaintiff's likely future working life with and without the accident: *Rattan* at para. 145, citing *Dornan* at paras. 156–157; *Bains v. Cheema*, 2022 BCCA 430 at para. 21.

[136] In *Rab*, the Court of Appeal set out a three-step process for considering claims for loss of future earning capacity at para. 47: (a) does the evidence disclose a potential future event that could give rise to a loss of capacity; (b) is there a real and substantial possibility that the future event in question will cause a pecuniary loss to the plaintiff; and (c) what is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?

[137] As with past loss of earning capacity, the assessment of future loss of earning capacity is a matter of judgment, not a mathematical assessment: *Colgrove* at para. 112. That said, the assessment must be grounded in a rigorous and evidence-based consideration of the applicable contingencies: *Dornan* at para. 160–161; *Rab* at para. 47; *Lo* at paras. 71–74.

[138] Mr. Jacques seeks an award of $4,689,000 for future loss of earning capacity, which is premised on the assumption that he would have earned on average $225,000 annually to age 70 as an excavation contractor employing two additional operators. Mr. Jacques submits that an annual income of $225,000 is fair and reasonable because his earning potential was $125,000 to $150,000 working as an excavator operator for others, and $200,000 to $300,000 running his own excavation company with two operators working for him.

[139] The defendant says that Mr. Jacques' future loss of earning capacity is in the range of approximately $800,000 to $1,132,000. His position is premised on Mr. Jacques working for others as an excavator operator earning $60,000 a year (2,000 hours at $30 per hour) in 2016 dollars, adjusted for inflation to $80,000, and retiring at age 65.

Rab Steps One and Two: Loss of Capacity and Pecuniary Loss

[140] When an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future, the first and second steps of the analysis may well be foregone conclusions since the plaintiff clearly lost capacity and income: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 11. The assessment is then not simply whether there was a loss of capacity, but whether that loss gave rise to a real and substantial possibility of a future loss and the value of that loss: *Ploskon-Ciesla* at para. 11; *Rab* at para. 33; *Ker v. Sidhu*, 2023 BCCA 158 at para. 44, leave to appeal to SCC ref'd, 40816 (11 January 2024).

[141] The defendant concedes that the first two steps of the *Rab* analysis are met. This concession is supported in the evidence: as a result of the accident, Mr. Jacques suffers from chronic pain and other physical and psychological injuries that have limited his ability to work as a heavy equipment operator and rendered him less competitively employable overall.

[142] I am also satisfied that there is a real and substantial possibility that Mr. Jacques' injuries from the accident—particularly his chronic pain and resulting SSD, and depression—will impair his earning capacity in the future, as it has done in the pre-trial period. It is undisputed that he is not able to sustain full-time employment in his pre-accident role as a heavy equipment operator, and I have concluded that his prospects of obtaining sustainable employment in the future are poor. I therefore find a real and substantial possibility that this limitation will lead to a pecuniary loss in the future.

Rab Step Three: Valuation

[143] At the third step of the analysis, the court may assess damages using the "earnings approach" or the "capital asset approach". The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, and typically involves a determination of the plaintiff's without accident future earning capacity, using expert actuarial and economic evidence as well as the plaintiff's past earnings history: *Kim v. Baldonero*, 2022 BCSC 167 at para. 91, citing *Lo* at para. 109; *Dornan* at paras. 155–156. The parties analyzed the plaintiff's claim for loss of future earning capacity based on the earnings approach. I will do the same.

Post-trial Without Accident Earning Capacity

Annual Income

[144] For the reasons set out above, I do not accept that there is a real and substantial possibility that absent the accident, Mr. Jacques would have established his own excavation business on Salt Spring earning $200,000 to $300,000 annually, working 2,000 or more hours on machine himself each year, with two additional operators working for him. The evidence simply does not establish a real and substantial possibility of this scenario coming to fruition.

[145] Mr. Jacques' efforts to build such a business were only at a very preliminary stage when the accident occurred. He had not taken any concrete steps beyond discussions with Mr. Drummond towards purchasing equipment, and his discussions with Mr. Hroch about going into business together were also in preliminary stages and lacked specificity. Neither testified to having a business plan, having taken steps towards addressing formal matters such as incorporation, or having taken steps related to administrative matters such as obtaining insurance or attending to banking or bookkeeping matters. Simply put, Mr. Jacques had only just began working as an excavator operator on Salt Spring and establishing himself in the local business community when the accident occurred, and had taken few concrete steps towards building his own excavation business beyond casual discussions with Mr. Drummond and Mr. Hroch.

[146] I find that the more likely scenario is that Mr. Jacques would have continued on the same path as in the pre-accident period, namely, working for Mr. Hroch, doing some of his own work using Mr. Hroch's equipment, and eventually leasing or purchasing an excavator of his own. As in the pre-trial period, I accept a real and substantial possibility that the plaintiff would have had on average full-time work available through a combination of his own jobs and working for others. The evidence does not, however, support a real and substantial possibility that overtime of on average five hours per week (as Mr. Jacques' calculations assume) would have been available, or that even if it was, he would have worked on average nine hours per day consistently to retirement.

[147] For someone with Mr. Jacques' skill set, using $120 per hour as an average machine rate (an approximate mid-point of the hourly machine rates for 35, 75 and 140 sized excavators), and factoring in the one-third operator/one-third owner/one-third machine ratio, the hourly income would be approximately $40 per hour for an operator and $80 per hour for an owner/operator, net of costs to the machine. This would in turn yield an annual income in the range of approximately $80,000 to $160,000 per year. In making this calculation, I recognize that the rate would have varied depending on the size of machine that Mr. Jacques was operating, whether he owned, rented or leased the machine, operation costs, and the distribution of work between various sizes of machines. That being said, I am also mindful that this exercise is an assessment, not a mathematical calculation.

[148] I accept that over time, the proportion of Mr. Jacques' work would likely have gradually shifted to favour more time working for himself on his own machine at more profitable rates than time spent working at lower rates on other people's machines, or at a discounted rate for Mr. Hroch. This is consistent with Mr. Szekely's opinion that basing Mr. Jacques' lifetime future loss of earning capacity on his mid-thirties pre-accident earnings risks undervaluing his earning capacity.

[149] In my view, the same positive and negative contingencies set out at paras. 125-128 above that arose in the pre-trial period apply in the post-trial period.

Applying these contingencies to Mr. Jacques' most likely earning capacity scenario as outlined above, I find that Mr. Jacques' post-trial without accident earning capacity would have been on average approximately $120,000 annually. Annualized average earnings of $120,000 represent a fair approximation of Mr. Jacques' potential earnings, given the hourly and machine rates substantiated in the evidence before me, and fall between the upper range of his earning capacity as an operator and the lower end of the range as an owner/operator. This figure is also comparable to his 2017 earnings of $92,000 at SageLink, which approximate $119,000 in 2024 dollars.

Retirement Age

[150] The plaintiff submits that he would have worked to age 70 because he had a strong work ethic, significant attachment to the workforce, and his father worked until he had a stroke in his 70s. He also notes that the average retirement age for self-employed people is 68. In the defendant's submission, it is unlikely that Mr. Jacques would have worked past age 65 because he demonstrated a weak attachment to the workforce and on account of the physically demanding nature of his work.

[151] The defendant relies on *Colgrove,* where the Court commented that retirement at age 65 "is a societal norm in most occupations" and "the default age for the commencement of a pension under the Canada Pension Plan": para. 123. There was no evidence of an alternative specific contingency in that case and the Court was not satisfied that the plaintiff's work ethic, among other factors, established a real and substantial possibility that she would have worked longer. Justice Gomery thus concluded that the plaintiff would have retired at age 65. In doing so, he noted the absence of evidence of the nature adduced in *Meckic v. Chan,* 2022 BCSC 182, where the plaintiff testified that she would have continued working as long as she felt able to and her father was 97 years old and still functioning: para. 124.

[152] Mr. Jacques relies on *Meckic* and gave essentially the same evidence about his intentions and his father's retirement as Ms. Meckic did. Mr. Jacques also notes that the average retirement age for self-employed people in Canada was 68.9 in

2022 and 68.6 in 2023. However, those statistics are for all self-employed people; they do not distinguish between people working in sedentary occupations and those working in physically demanding occupations like Mr. Jacques.

[153] I am not persuaded that Mr. Jacques' evidence, considered in conjunction with the statistical evidence, establishes a real and substantial possibility that he would have worked full-time to age 70. Mr. Jacques testified that he had not really thought about retirement as he was focussed on building his business, but intended to work "his whole life". While I accept that on reflection he may well have intended that to be the case, his bare assertion to that effect is not sufficient to establish a real and substantial possibility that he would have worked full-time to age 70. This is particularly the case given the physically demanding nature of his work and his somewhat weak attachment to the workforce. The statistical evidence is also of limited use given its over-inclusivity.

[154] Accordingly, I find a real and substantial possibility that Mr. Jacques would have worked to age 65. There is also a real and substantial possibility that given the nature of his work and personal circumstances, Mr. Jacques may have left the workforce or chosen to work part-time or retire before age 65. However, I decline to apply a further general contingency to account for this because in my view, these contingencies are sufficiently accounted for in the economic multipliers, as discussed further below.

The Appropriate Economic Multiplier

[155] Both parties tendered reports from economists: Mr. Benning for Mr. Jacques and Mr. Szekely for the defendant. The economists agree on the actuarial multiplier, but have significantly different views on the economic multiplier and appropriate application of general labour market contingencies.

[156] Mr. Benning opined that because Mr. Jacques was self-employed with a marketable skill, the only appropriate general labour market contingency is the risk of involuntary non-participation due to illness or injury, resulting in a reduction of approximately 4%. Mr. Szekely, on the other hand, opines that the actuarial

multiplier should be reduced by 33% through the application of general labour market contingencies, with a large portion of this deduction arising from labour market participation rates and unemployment.

[157] Mr. Szekely's deductions are of somewhat limited application to Mr. Jacques given that he was self-employed. Indeed, the defendant conceded in closing submissions that Mr. Szekely's economic multiplier was flawed and instead proposed a 20% reduction, relying on *Bates v. Buchanan*, 2023 BCSC 687 at para. 170.

[158] The Court may—not must—reduce a plaintiff's future earnings for general labour market contingencies, and if it does so, the deduction must be modest: *Rattan* at para. 147, citing *Steinlauf* at para. 91. *Bates* provides no authority to the contrary. The 20% general contingency deduction applied in that case was by agreement of the parties. Recent decisions have also declined to apply any deduction for general labour market contingencies on the basis that they would be offset by positive contingencies: see e.g. *Boal v. Parilla*, 2022 BCSC 2075 at para. 173; *Verma v. Friesen*, 2024 BCSC 13 at para. 226.

[159] In my view, consistent with the applicable authorities, Mr. Benning's economic multiplier provides for a modest reduction for involuntary general labour market contingencies. Given the contingencies I have already factored into my assessment of Mr. Jacques' likely average annualized without-accident earnings, I find that Mr. Benning's multiplier is the appropriate one to use in the present circumstances.

Post-trial With Accident Earning Capacity

[160] Mr. Jacques has not worked in any meaningful respect since the accident. This is consistent with the medical opinion evidence regarding his prognosis and Dr. Pullyblank's and Ms. Abdel-Barr's evidence, both of whom opined that given his current constellation of physical and psychological symptoms, Mr. Jacques faces significant barriers to future employment, and his prospect of obtaining sustainable employment, even on a part-time basis, is poor. He is totally disabled from working

in his pre-accident employment, is not a suitable candidate for vocational rehabilitation or retraining, and is not competitively employable.

[161] I acknowledged that there remains the prospect that with treatment for both his physical and psychological conditions, Mr. Jacques may regain the ability to work part-time for a very accommodating employer. However, treatment may not be effective in this respect, and courts have recognized as a matter of ordinary experience and common sense that a person's ability to tolerate chronic pain diminishes with age: see e.g. *Davidge v. Fairholm*, 2014 BCSC 1948 at para. 166(e); *Morlan v. Barrett*, 2012 BCCA 66 at para. 41.

[162] In the circumstances, I decline to apply a contingency to account for the prospect that Mr. Jacques may retain some residual earning capacity. The medical evidence simply does not support there being a real and substantial possibility of him returning to the workforce in any meaningful capacity in the future.

[163] In the result, I assess Mr. Jacques' loss of future earning capacity as $120,000 per year to age 65. Applying Mr. Benning's economic multiplier and rounding results in an award of $2,247,840. In my view, this award is fair and reasonable when considered in the context of the evidence as a whole. Mr. Jacques was relatively young and heading into his prime working years in a skilled and physically demanding position when the accident occurred, and his injuries have left him unemployed with poor prospects of re-entering the workforce.

Cost of Future Care

[164] The purpose of the award for costs of future care is to restore the injured party to the position they would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Pang v. Nowakowski*, 2021 BCCA 478, at para. 56, citing *Quigly v. Cymbalisty*, 2021 BCCA 33 at para. 43.

[165] An award for a future care cost must have medical justification and be reasonable, but it is not necessary for a physician to testify to the medical necessity

of each individual item of care claimed: *Quigly* at para. 44. As set out in *Pang* at para. 57, the court must also be satisfied that:

a) the plaintiff would, in fact, make use of the particular care item;

b) the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred; and

c) there is no significant overlap in the various care items being sought.

[166] Assessing damages for future care requires an element of prediction and is therefore an assessment, not a precise accounting. The task faced by the court in this respect was summarized by the Supreme Court of Canada in *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9:

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

[167] The award should reflect a reasonable expectation of what is required to put the plaintiff in the position they would have been in but for the accident. The assessment is an objective one, based on the evidence, and must be fair to both parties: *Pang* at para. 58.

[168] Mr. Jacques seeks an award of $547,355 for cost of future care, relying in large part on Ms. Abdel-Barr’s recommendations and the cost of future care multipliers and present value analysis provided in Mr. Benning’s report. The defendant submits that a total award for all aspects of cost of future care is in the range of $35,000 to $50,000. In my view, the defendant’s submission is not reflective of the evidence and underestimates the likely cost of future care required to address

the plaintiff's ongoing injuries, which the defendant concedes are debilitating and life-changing.

[169] However, I find that Mr. Jacques' position overstates his likely need for future care. In costing the individual items that Ms. Abdel-Barr recommended be incurred on an ongoing basis, Mr. Benning appears to have applied a multiplier awarding those items through to 2089, when Mr. Jacques would be 106 years old. This was not expressly identified in Mr. Benning's report or the plaintiff's submissions. There is no basis in the evidence or rationale provided for awarding care items to age 106 and I decline to do so. Where necessary, I have adjusted my awards to reflect what I have determined to be a more appropriate timeline for ongoing cost of future care expenses based on what is, in my view, reasonably necessary on evidence to promote the plaintiff's mental and physical health.

Psychological Counselling

[170] The plaintiff claims $70,171 on account of cost of future psychological counselling. The defendant submits that an award of $3,300, representing approximately 15 sessions over the next four years, is all that is warranted in the circumstances.

[171] In my view, the defendant's position understates the likely frequency of treatment and resulting cost of care required by the plaintiff and is inconsistent with the preponderance of the evidence. Each of Drs. Lu, Waspe and Pullyblank recommended ongoing psychotherapy for the plaintiff. Dr. Lu opined that due to the complexity of the plaintiff's symptoms, more intensive psychological treatment should continue with a specific focus on the plaintiff's depression and chronic pain. Dr. Pullyblank made the same diagnoses as Dr. Lu, and recommended weekly sessions for an initial year, with further requirements to be evaluated.

[172] These recommendations were not undermined in cross-examination, nor is there any evidence to the contrary. Rather, the plaintiff's undisputed evidence is that he underwent psychological counselling at a cost of $5,580 in the approximately fourteen months leading up to trial and found it beneficial. The plaintiff's prognosis

for improvement is guarded, which suggests a continuing need for psychological treatment. In the circumstances, I am satisfied that Mr. Jacques will in fact make use of psychological counselling and that it is necessitated because of his injuries from the accident.

[173] I find that weekly psychological counselling sessions for the first year (48 sessions) and on a monthly basis thereafter (12 sessions per year) is medically justified and reasonable in the circumstances. I thus award $11,040 for the first year and $2,300 per year as thereafter to age 75. This results in a present value award of $62,149 on account of cost of future psychological treatment.

Massage Therapy and Physiotherapy

[174] In the years immediately following the accident, Mr. Jacques obtained physiotherapy and massage therapy. He is not currently undergoing these treatment modalities due to his current living and financial situation, but intends to resume treatment once his situation stabilizes. He seeks $33,706 for physiotherapy and $43,818 for massage therapy.

[175] The defendant contends that ongoing lifetime awards for monthly physiotherapy and monthly massage therapy as recommended by Ms. Abdel-Barr are not justified or reasonable in the circumstances. He submits that a more modest award, consistent with Dr. Waspe's recommendations, is appropriate. I agree.

[176] Dr. Waspe opined that ongoing passive modalities for musculoskeletal management "are both costly and time consuming and can reduce a patient's sense of self-mastery over pain and dysfunction" and testified in cross-examination that there is a body of evidence suggesting passive modalities have a lower level of efficacy. Dr. Waspe also noted that "the expectation of a return to complete normal pre-accident baseline is no longer a reasonable goal now [seven] years post impact, nor should this be the goal of well-meaning therapists, specialists or interventionists". In Dr. Waspe's view, the goal going forward is to maintain and manage Mr. Jacques' function and pain tolerance while participating in meaningful aspects of daily living.

[177] With respect to massage therapy, Dr. Waspe recommended a contingency for massage therapy to address periodic flare-ups of 5–10 sessions per year for four years at a cost of $90–120 per session for deep acupressure fascial release. She also recommended that Mr. Jacques be educated on self-application of deep acupressure techniques to limit the need for external assistance and maximize his independence over pain. Dr. Heran also recommended passive therapy to manage flareups, but on an indefinite basis.

[178] I prefer Drs. Waspe and Heran's recommendation regarding massage therapy to that of Ms. Abdel-Barr's and find an award to address periodic flareups and educate Mr. Jacques on acupressure techniques is medically justified and reasonable in the circumstances. In my view, an award for massage therapy equivalent to ten sessions per year for four years, reduced to six sessions per year thereafter to age 70 at a cost of $120 per session is appropriate. Applying Mr. Benning's cost of future care multipliers results in an award of $17,153.

[179] With respect to physiotherapy, Dr. Waspe strongly recommended that Mr. Jacques "review on occasion with a physiotherapist, sports trainer or kinesiologist to improve his technique and a personal home exercise self-maintenance program" to assist him in self-management. She opined that this would have the concomitant effect of improving his financial stability and pain, thereby also having a positive effect on his mental health and sleep. However, Dr. Waspe did not make any recommendation as to the frequency of treatment. Dr. Heran provided a highly generalized recommendation to similar effect, namely that if Mr. Jacques were to experience exacerbations or aggravations of his pain, then "active and passive modality therapies would be recommended for him".

[180] Ms. Abdel-Barr in turn opined that Mr. Jacques should have access to physiotherapy for symptom management during periods of exacerbations or aggravations. Drawing on her experience working with individuals suffering from chronic pain, she recommended physiotherapy on a monthly basis (12 sessions per year) for an indefinite period.

[181] I again prefer Drs. Waspe and Heran's recommendations for treatment to address periodic flare-ups over Ms. Abdel-Barr's. The frequency of treatment (effectively once per month) that Ms. Abdel-Barr recommends is difficult to reconcile with her opinion that physiotherapy should be used on an as needed basis to address flareups. In my view, an award for physiotherapy equivalent to ten sessions per year for four years, reduced to six sessions per year thereafter to age 70 at a cost of $80 per session is appropriate. Applying Mr. Benning's cost of future care multipliers, this results in an award of $11,435.

[182] I therefore award $28,588 on account of massage therapy and physiotherapy.

Kinesiology and Fitness Pass

[183] The plaintiff claims $67,775 for kinesiology and associated fitness passes. He worked with a kinesiologist at various points in time pre-accident and testified that he found this helpful. He also testified that he would use a fitness pass to access a pool and sauna if available to him. I accept the plaintiff's evidence in this respect and find that these care items are likely to be utilized and necessitated by his accident-related injuries.

[184] Dr. Waspe recommended the plaintiff to obtain treatment from one of a "physiotherapist, sports trainer or kinesiologist" (emphasis added). Ms. Abdel-Barr opined that Mr. Jacques would benefit from participation in supported programming for strength and conditioning and pain management and that it will be important for him to return to and maintain a supervised exercise program under the direction of a kinesiologist. She recommends that Mr. Jacques work with a kinesiologist twice per week for the first 12 months then attend 12–24 sessions per year "for as long as he is experiencing pain", which Mr. Benning then costed to age 106. The defendant submits that a total of 20 sessions with a kinesiologist representing an award of $1,626 is appropriate.

[185] I find Ms. Abdel-Barr's recommendation is excessive and unreasonable in the circumstances, particularly considering Dr. Waspe's recommendations and my award for physiotherapy above. That being said, given the undisputed chronic nature

of Mr. Jacques' pain, the importance that Dr. Waspe placed on him returning to and maintaining an active lifestyle, and the benefits Mr. Jacques previously obtained from working with a kinesiologist, I am satisfied an award for kinesiology is medically justified. I thus award 12 kinesiology sessions for the first year, followed by four sessions annually to age 70 at a cost of $87.50 per session, which results in an award of $8,137.

[186] With respect to fitness passes, I find that the cost of a pass for the plaintiff to age 70 is reasonably necessary in the circumstances, and I award $10,041 in this respect (based on an annual cost of $472). A second pass for a kinesiologist to attend at a fitness centre with the plaintiff is not, in my view, medically justified or necessary on the evidence, and is also potentially duplicative given the award I have made for kinesiology treatment.

[187] I therefore award $18,178 for kinesiology and fitness.

Occupational Therapy and Ergonomic Equipment

[188] The plaintiff claims $50,144 on account of future use of occupational therapy based on Ms. Abdel-Barr's recommendation of two hours per month for five years, then one hour per month on an ongoing basis thereafter. Ms. Abdel-Barr recommended occupational therapy for case management support for chronic pain, SSD and depression, with a goal of providing ergonomic strategies within the context of pain management.

[189] The plaintiff attended occupational therapy sessions from May 2017 to June 2018, and two additional sessions in January and February 2019. The plaintiff's evidence was that he found occupational therapy helpful in that it connected him to an athletic trainer and to counselling services on Salt Spring. He did not testify to any discernible benefit from occupational therapy itself and was uncertain as to what services an occupational therapist would provide going forwards.

[190] In my view, an award for continued access to occupational therapy services is warranted, but not to extent recommended by Ms. Abdel-Barr, particularly given the

broad treatment goals she described that overlap with care being provided by way of the other treatment modalities for which I have made provisions above. In my view, six hours of occupational therapy per year for five years is reasonable, medically justified and likely to be utilized by the plaintiff. I thus award $3,775 using the average rate proposed by Ms. Abdel-Barr of $133 per hour, in this respect in accordance with the future cost calculations by Mr. Benning.

[191] The plaintiff also seeks an award of $5,885 for ergonomic equipment as recommended Ms. Abdel-Barr, namely: a height-adjustable desk and ergonomic chair for home computing tasks; a perching stool to provide support when standing and working on the computer; an anti-fatigue mat to provide support when doing standing tasks; and heating pads to assist in managing his back, shoulder and neck pain. The defendant did not dispute this amount, and I am satisfied that these items are reasonable, medically justified and likely to be used by the plaintiff. I thus award the one-time cost for each of these items resulting in an award of $3,342 for ergonomic equipment.

Medication

[192] I am satisfied on the evidence that the plaintiff has demonstrated medical justification for this care item because both Drs. Heran and Lu recommended that the plaintiff trial various medications. Dr. Lu testified that Mr. Jacques would benefit from anti-depressants (which if well-tolerated, he should take for at least five years), sleep, and pain medication.

[193] The plaintiff recognizes that there is duplication in the recommended medications and thus limits his claim to gabapentin, lemborexantx and brexpiprazole. These medications were costed by Mr. Benning in the amount of $1,288 for the first year and $50,924 for ongoing use. The plaintiff seeks a contingency amount of $40,000 for future trials and ongoing use of prescription medications.

[194] The defendant says an award of $1,000 to trial medications in the first year, together with a $15,000 contingency for future mediation is appropriate because of

duplication in the medication recommendations. The defendant also submits that it is unlikely the plaintiff will take even those medications that do provide relief, or do so for the rest of his life given Mr. Jacques' evidence that he does not like taking medication, and Ms. Abdel-Barr's evidence that as of September 2023, the plaintiff reported he was not taking any prescription medication because of a fear of addiction.

[195] I am satisfied that an award for future cost of trialling and taking medications to address depression, sleep and pain is medically justified and reasonable. Such medications are likely to be used by the plaintiff into the future, particularly in light of the overall guarded prognoses set out in the expert evidence as summarized above. However, I accept that the plaintiff is averse to taking medications and therefore find it unlikely that he will utilize the full amount of the contingency he seeks. Accordingly, I award of $20,000 as a contingency for the future cost of prescription medication.

[196] The plaintiff testified that he also takes over the counter medications and claims $835 on account of cost of future use of Advil. This amount was undisputed and I award it to age 75, resulting in an award of $721.

[197] Finally, the plaintiff seeks $851 on account of additional MRI imaging as recommended by Dr. Heran to assess the plaintiff's current pain related to his C7 surgical site. However, Dr. Heran did not indicate that these scans were needed on an urgent basis or why they would need to be obtained at a private clinic with the attendant cost to Mr. Jacques. Dr. Waspe also recommended that an MRI may be warranted, but noted that it would be covered under the medical service plan. I therefore decline to make an award for this item as the plaintiff has not established that this care item is medically justified and reasonable on the evidence: *Krupinski v. Randle*, 2024 BCSC 523 at paras. 400–406.

Homemaking Assistance

[198] Based on Ms. Abdel-Barr's recommendations, the plaintiff seeks $234,220 on account of homemaking services for seasonal cleaning ($115,282), interior and exterior cleaning ($47,042), and yard care and gardening ($71,896) to age 80. Mr.

Jacques' evidence was that he kept his home tidy prior to the accident, but struggled to do so afterwards because working with his arms above his head or being bent over aggravated his pain symptoms.

[199] The defendant submits that no award is warranted because the plaintiff has the ability to perform homemaking and maintenance tasks. Alternatively, the defendant relies on *Pelley v. Frederickson*, 2021 BCSC 82 at para. 138, to assert that a modest award of $15,000 is sufficient. I do not find *Pelley* particularly helpful because unlike Mr. Jacques, Mr. Pelly's condition and corresponding capacity for housekeeping was likely to improve.

[200] Ms. Abdel-Barr concluded that Mr. Jacques is modified independent, meaning that he can do most tasks with modifications, but he avoided certain tasks or was not required to do them because he was living in his camper at the time of her assessment. Mr. Jacques was capable of performing a variety of activities similar to home and work tasks, some with pain, but did not demonstrate the ability to complete all tasks. Mr. Jacques reported that he had to prioritize tasks in a day between travel, setting up his camper, vehicle maintenance, as well as his rehabilitation exercise and fitness program.

[201] Ms. Abdel-Barr thus recommended that depending on his living situation, Mr. Jacques should have assistance with heavier, repetitive, or longer duration tasks including vehicle maintenance, heavier based cleaning, seasonal cleaning/projects within his home, exterior home maintenance, and yard/garden care. Ms. Abdel-Barr assessed the plaintiff's capacity to perform heavier and seasonal cleaning at 50%, his capacity for interior and exterior maintenance tasks at 30%, and his yard care and gardening capacity at 50%. She made the following recommendations for homemaking assistance: 10 hours per month for heavier based and seasonal cleaning; 33 hours per year for interior and exterior maintenance; and 40 hours per year for yard care and gardening.

[202] Having considered Ms. Abdel-Barr's functional capacity evaluation in the context of the evidence as a whole, I find that her evaluation likely understates the

plaintiff's functional capacity as it relates to homemaking tasks. First, Ms. Abdel-Barr admitted that the significant amount of repetitive testing for reaching, bending and squatting likely influenced subsequent test results. Second, Ms. Abdel-Barr was not aware that the plaintiff had been performing physical handyman tasks (running a mini-excavator and helping build a shed) post-accident. She agreed that it would have been important to her assessment to know when he was doing this and how it affected his symptoms.

[203] That said, Mr. Jacques did those tasks in 2020, prior to the C7 radiculopathy and resulting discectomy surgery, and I accept the plaintiff's evidence that following the surgery, he was more limited in his what he could do pre-surgery. Nonetheless, the fact that Ms. Abdel-Barr did not have a complete understanding of the plaintiff's ability to perform physical handyman tasks lessens somewhat the weight that can be given to her opinion in this respect, but not to the extent suggested by the defendant.

[204] It is also questionable whether Ms. Abdel-Barr's recommended frequency of homemaking services is reasonable, and whether the plaintiff would in fact make use of them. Ms. Abdel-Barr described her award as reflecting "periodic" assistance, but her recommendations amount to approximately four hours of assistance on a weekly basis to age 80.

[205] Her recommendations were also depending on Mr. Jacques' living circumstances. Predicting what Mr. Jacques' hypothetical future living circumstances might be and his corresponding need for homemaking assistance is complicated by the uncertainty of, and variability in, his living situation. Ms. Abdel-Barr was aware that Mr. Jacques was living in a camper at the time of her assessment, but her recommendations are predicated on him living in a rented or owned home in a rural setting, where he will be required to perform heavier/seasonal cleaning tasks and will be responsible for maintenance and yard work. She did not indicate the approximate size of home or property upon which her recommendations were premised, other than to assume that it would be located in in Powell River or Salt Spring.

[206] At the time of the accident, Mr. Jacques was living in rural rental accommodation on Salt Spring where he was responsible for maintaining the home and surrounding property. He testified that he hoped to live in a house again, but that was the extent of his evidence on this point.

[207] I am not satisfied that Mr. Jacques has established a real and substantial possibility that he will return to living in the same type of single-family rural accommodation, with the concomitant home and maintenance requirements, as he did pre-accident. In the months leading up to trial, Mr. Jacques has been living in his trailer on a friend's property on Salt Spring. There is little evidence before me about the availability of different types of accommodation on Salt Spring, other than Mr. Gossett's evidence that he has had trouble retaining operators because finding accommodation on the island is difficult.

[208] In the circumstances, I conclude that the full award for cost of future homemaking services as recommended by Ms. Abdel-Barr and sought by the plaintiff to age 80 is not medically justified because her functional capacity evaluation may understate his actual capacity, and is not reasonable in light of the plaintiff's current and reasonably anticipated future living circumstances.

[209] That being said, I am satisfied that the evidence establishes that Mr. Jacques does have diminished capacity for homemaking tasks. His current situation of living in a camper is unlikely to be permanent, and he will require some assistance with heavier/seasonal cleaning and maintenance when he obtains more stable accommodation. Accordingly, I award $59,320 in respect of homemaking assistance, comprised of: (a) $43,269 representing 48 hours per year for heavier/seasonal cleaning at a cost of $38.75 per hour to age 75; and (b) $32,103 representing 24 hours per year for interior/exterior maintenance to age 75 at a cost of $57.50 per hour. I also award a nominal amount of $10,000 for yard work, for a total award for homemaking assistance of $85,372.

Conclusion on Cost of Future Care

[210] In the result, I find that the following allowances are reasonably necessary on the medical evidence to promote the plaintiff's mental and physical health:

a) $62,149 for psychotherapy and counselling;

b) $28,588 for physiotherapy and massage therapy;

c) $18,178 for kinesiology and fitness centre access;

d) $7,117 for occupational therapy and ergonomic equipment;

e) $20,721 for prescription and over the counter medication; and

f) $85,372 for homemaking assistance.

[211] The plaintiff is thus awarded $222,125 for cost of future care.

Special Damages

[212] The plaintiff seeks an award of $22,939.49 on account of special damages and asserts that these expenses were all reasonably incurred and directly attributable to the injuries he suffered in the accident. Of this amount, $12,383.49 pertains to expenses incurred for medical and paramedical treatment and is not disputed by the defendant. Mr. Jacques also claims $8,396 on account of transportation costs, namely ferry fares and mileage. The defendant made no submissions on the reasonableness of the transportation expenses.

[213] Out-of-pocket expenses are compensable as special damages when they are reasonable and incurred as a result of the accident: *X. v. Y.*, 2011 BCSC 944 at para. 281, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79, 1985 CanLII 179 (S.C.), aff'd (1987) 49 B.C.L.R. (2d) 99 (C.A.), [1987] B.C.J. No. 1833. Reasonableness is assessed with reference to the context of the injuries, including medical justification for the expenses and the plaintiff's subjective belief that the

expenses were reasonably necessary: *Fryer v. Nakusp (Village)*, 2022 BCSC 497 at para. 248.

[214] I am satisfied that Mr. Jacques is entitled to special damages in respect of medical and paramedical treatments as claimed in the amount of $12,383.49. These expenses were reasonable and directly attributable to the physical and psychological injuries that he suffered as a result of the accident.

[215] With respect to travel costs, the plaintiff testified that he travelled from Salt Spring to Victoria for treatment at Synergy Health 79 times, which required him to drive 50 km and incur ferry fares of $40, round trip. However, Mr. Jacques' records indicate that he made this trip 52 times. After moving to Powell River, the plaintiff testified that he travelled to Vancouver for trigger point injections at the Denman Medical Centre 18 times, which required him to drive 150 km and incur ferry fares of $60, each way (which is 300 km and ferry fares of $120, round trip).

[216] Recent decisions from this Court suggest that where there is a lack of evidence establishing actual travel costs, $0.50 per km is a reasonable approximation of the cost of travel by car: see e.g. *Mellesmoen v. Cullen*, 2022 BCSC 1985 at paras. 317–320, citing *Grant v. Ditmarsia Holdings Ltd.*, 2020 BCSC 1705; *Manhas v. Jaswal*, 2020 BCSC 586 at para. 86; *Choy v. Stimpson*, 2021 BCSC 1020.

[217] The plaintiff's evidence regarding the cost of ferry travel was undisputed, and consistent with this Court's jurisprudence, I am satisfied that $0.50 per km is an appropriate reasonable approximation of the cost of travel by car to obtain treatment in Victoria and Vancouver. I thus award special damages in the amount of $4,240 in ferry costs and $4,000 in mileage.

[218] As a result, I find the plaintiff is entitled to special damages in the amount of $20,623, namely $12,383.49 in medical and paramedical expenses, and $8,240 in travel expenses, rounded to the nearest dollar.

Conclusion

[219] In the result, I find that Mr. Jacques is entitled to the following damages:

a) Non-pecuniary damages	$225,000
b) Past loss of earning capacity	$610,000
c) Loss of future earning capacity	$2,247,840
d) Cost of future care	$222,125
e) Special damages	$20,623

[220] Mr. Jacques is awarded damages in the amount of $3,325,588, subject to applicable statutory deductions where noted above, to be agreed to by the parties.

[221] As the successful party, Mr. Jacques is presumptively entitled to his costs at Scale B. If either party seeks an alternative costs order, leave is granted to request a further hearing before me within 30 days of the date of this judgment.

"Hughes J."