IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Baragar v. Bowers,*
2024 BCSC 1656

Date: 20240906
Docket: M185572
Registry: Victoria

Between:

Darcy Baragar

Plaintiff

And

Trevor Alexander Bowers

Defendant

Before: The Honourable Justice Hoffman

Reasons for Judgment

Counsel for the Plaintiff:	M. Martin K. Bhandar
Counsel for the Defendant:	N.A. Mosky T.C. Chiu
Place and Date of Trial/Hearing:	Victoria, B.C. June 18–21, 2024 June 24–28, 2024
Place and Date of Judgment:	Victoria, B.C. September 6, 2024

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INTRODUCTION

[1] The parties in this proceeding were involved in a motor vehicle accident in the dark and rainy early morning hours of January 17, 2018, in Mill Bay, British Columbia ("the Accident").

[2] The plaintiff was the owner and operator of a 1991 Volkswagen Jetta (the "Volkswagen") that was rear-ended at high speed by a 2001 Chevrolet Silverado pickup truck just south of the intersection of the TransCanada highway and Frayne Road. Just prior to the impact, the plaintiff was having mechanical issues with the Volkswagen and was attempting to pull over to the side of the road.

[3] At the time of the Accident, the plaintiff was 48 years old and held journeyman certifications for both welding and metal fabricating. He was employed as a full-time truck driver but was on leave to do welding work on a 10-day project at the Crofton Mill. He was driving to work at the time of the Accident.

ISSUES

[4] Liability for the Accident is in dispute. Despite that this was a rear-end collision, the defendant, Trevor Bowers, takes the position that the Accident occurred without negligence on his part, or, in the alternative, that liability should be apportioned between the parties.

[5] While Mr. Bowers accepts that the plaintiff was injured in the Accident, the extent and long-term impact of these injuries are disputed. The main issues regarding damages are the impact of the plaintiff's injuries on his capacity to earn an income, whether he is entitled to a separate award for loss of handyman/housekeeping capacity and whether he has taken sufficient steps to mitigate his injuries.

[6] The parties agree that the plaintiff is entitled to an award of special damages in the amount of $8,837.20.

THE ACCIDENT

[7] By way of overview, I will review the evidence not in dispute.

[8] The parties were traveling northbound on the TransCanada Highway. The Accident occurred south of the intersection with Frayne Road. The northbound lanes in this location consist of two through lanes that travel through the intersection, referred to as the fast lane and the slow lane, a left-hand turn lane and a right-hand turn lane. There is also a shoulder. The intersection is controlled by a traffic light; some distance before the intersection, there is an overhead sign with a light warning that there is a controlled intersection ahead. The intersection is lit by several light standards on both sides of the highway. There is also a concrete barrier on the far edge of the shoulder that commences approximately where the right-hand turn lane starts. This barrier comes to an end before the intersection. The TransCanada Highway in this location is a straight stretch of road.

[9] The Accident occurred before dawn. It was raining, and the road surface was wet.

[10] Just prior to the impact, the plaintiff was having mechanical issues with his vehicle and was attempting to pull over to the side of the road. At the point of impact, despite the fact that his vehicle was losing power, he did not have his hazard lights on.

[11] The front passenger side of Mr. Bowers' truck struck the rear driver's side of the Volkswagen. The force of the collision caused the Volkswagen to spin around and come to rest at a 45-degree angle to the road facing southbound with the Mr. Bowers' truck stopped behind it but not touching the Volkswagen. The Volkswagen was extensively damaged in the collision.

Conflicts in the Evidence

[12] As there are material conflicts in the evidence regarding the nature and impact of the mechanical issues in the Volkswagen, how the Accident occurred and

where the collision took place, I will summarize the evidence of each witness relating to liability.

The Plaintiff

[13] On the morning of the Accident, the plaintiff woke up between 5 and 5:30 a.m. to prepare for his commute to his job at the Crofton Mill.

[14] Based on his work experience as a truck driver, he has a habit of walking around his vehicle to do a safety check of brakes, lights and tires. When he drove his personal vehicle, it was also his habit to back into parking spots as it provides the opportunity to check that he can see the reflection of his taillights.

[15] The Volkswagen used to be his wife's car, but they had purchased her another vehicle. The plaintiff was driving the Volkswagen because it was cheaper on gas than his car. The headlights and running lights needed to be manually turned on once the car was started.

[16] The plaintiff testified that when he got into car that morning, he backed up to his garage and saw the reflection of his taillights on the garage door.

[17] Their property was at the end of a long downhill driveway off the TransCanada Highway. There were no lights on the driveway, and there were no streetlights where the driveway met the highway. He testified that he would not have been able to see his driveway if he did not turn on his headlights.

[18] The plaintiff observed very light traffic on the highway towards Crofton. As he approached Frayne Road, his car suddenly lost power and steam started to come out from under the dash. When this occurred, he was travelling in the slow lane, the lane closest to the shoulder.

[19] His initial thought was to turn left at the upcoming intersection and pull the car into the park and ride parking lot so he could call his wife. However, he realized that turning left would risk the possibility that his car would stall out in the intersection and become a hazard.

[20] The plaintiff signalled right and got back into the slow lane. He testified that he was constantly watching his mirrors and did not see any vehicles behind him. On cross-examination, he confirmed that he did not do a shoulder check before making this lane change. He also testified that when making the lane change, the steam in his vehicle was not yet severe.

[21] The upcoming intersection was well-lit. He could see that there was a right turn lane ahead and a wide shoulder with room for him to pull completely off the road. He could also see a concrete barrier on the far side of the shoulder that ended before the intersection. His thought was to pull his car into the ditch beyond the barrier so he would be protected by the barrier.

[22] Just after the plaintiff's car came alongside the barrier, he began to hug the shoulder and was so close to the barrier that he became concerned that it would scrape the side of his car. He estimated his speed at this point to be about 40 kilometers per hour. This deceleration was due to loss of engine power, as he had his foot on the accelerator.

[23] On cross-examination, the plaintiff admitted that he understood that he was a hazard to oncoming vehicles. However, prior to the impact he did not activate his hazard lights. As he was not used to driving this vehicle, the hazards were in a different location than he was used to. Prior to the impact he was looking for them, but did not get to them before the impact. He was unable to roll down the windows to clear the steam because the manual handle for the driver's side window was broken. At this point, he could barely see the rear-view mirror due to the build up of steam but testified that he could still see reflections or lights and he saw nothing in his rear-view mirror.

[24] The plaintiff had a previous heater core failure in another vehicle. What he was experiencing was similar so he assumed that this was the issue. Based on his experience with vehicles, he testified that a heater core failure would have had no impact on the lighting system in the Volkswagen. On cross-examination, he

disagreed with the suggestion that water vapour inside the car could short circuit the electrical system. In his view, a short circuit would not happen that quickly.

[25] By the time the plaintiff came alongside the barrier, the steam in the car had built up so much it was obscuring his vision and he could not see out the windows. He was focusing on the barrier as a reference point. On cross-examination, he estimated that his vehicle slowed to approximately 5 kilometres per hour prior to the impact. He also testified that at this point, he was completely on the shoulder, off the travelled portion of the roadway. This was slightly different from evidence that he gave on an examination for discovery in February 2024. On discovery, he gave evidence that his car had slowed to 5 kilometres per hour for a minute or more prior to the impact and that his car may have been slightly in the turn lane but was mostly on the shoulder.

[26] On cross-examination he clarified that he was no longer looking in his rear-view mirror once he was along side the barrier. He then looked forward and saw a light. He could not be sure whether it was the overhead light on the intersection warning sign or headlights in his rear-view mirror. This was the last thing he could remember until he woke up and saw someone on the hood of his car. He did not see Mr. Bowers' vehicle before the impact.

[27] The impact of the collision broke the driver's seat so that the plaintiff's upper body was in the backseat.

[28] When the plaintiff tried to open the driver's side door, first responders at the scene told him that he could not get out his vehicle that way. The plaintiff testified that he was very foggy. Once he got out of the car and was taken to the ambulance, he began to piece together what had happened. He felt like he was "in a fog" and "dazed and confused." He was taken to hospital in Victoria. He remembers only bits and pieces of the immediate aftermath of the Accident and being in the emergency department. Once his wife arrived at the hospital, he was sent for a CT scan but has no memory of this procedure.

Danielle Baragar

[29] Mrs. Baragar testified that they had a window in their house that overlooked the driveway and that on the morning of the Accident, she watched the plaintiff drive up the driveway and recalls seeing that his tail lights were on.

Mr. Bowers

[30] On the morning of the Accident, Mr. Bowers was driving to his workplace in Duncan. As of the date of the Accident, he had driven this route every day for a year. To reach Duncan, he was intending to travel straight through the intersection near where the Accident occurred. He observed limited traffic on the highway. In direct, Mr. Bowers testified that he was driving with his headlights on, but he could not recall if he was using his low or high beams. He testified that because there were limited streetlights on the highway between his house and Duncan some stretches were fairly dark. On cross-examination he admitted that he would have used his high beams for some of the drive from his home. However, he was unable to confirm whether he had them on at the time of impact.

[31] The only thing impeding Mr. Bowers' vision just prior to the Accident was the rain and darkness. He could not initially recall if the intersection was well-lit, although he conceded in cross-examination that there are several light standards in the vicinity of the intersection.

[32] According to Mr. Bowers, as he approached the intersection and before the commencement of the right-hand turn lane, all of the sudden there was a vehicle that was half in his lane that he did not see until the last second. At his examination for discovery, Mr. Bowers gave evidence that "by the time I seen him, there was no time to swerve … I barely I [sic] had enough time to hit the brakes."

[33] Mr. Bowers was unable to say how far away this vehicle was when he first saw it. He estimated that he was travelling 80 kilometres per hour. The posted speed limit in this location is 90 kilometres per hour. He applied his brakes as hard as he could but was unable to avoid the collision.

[34] Mr. Bowers testified that the tail lights on the plaintiff's vehicle were not illuminated and that the impact occurred before the start of the right-hand turn lane. Mr. Bowers denied doing anything that would distract him from driving or seeing the Volkswagen.

[35] Mr. Bowers got out of his vehicle, went to the other vehicle and observed that the plaintiff was injured. He called 911 within two minutes of the impact. Mr. Bowers heard the plaintiff moan. He testified that the plaintiff appeared to be conscious until the emergency vehicles arrived. On cross-examination, he admitted he did not watch the plaintiff the whole time he was at the scene. Mr. Bowers admitted that he had no first aid or medical training to assess consciousness. He testified that a firefighter who attended the scene told him that the plaintiff was conscious.

[36] Mr. Bowers estimated that Mr. Shields, the off-duty fire fighter, was on the scene within about four minutes of the impact. Either he or Mr. Shields turned down the radio, which was very loud.

[37] At some point after the Accident, Mr. Bowers' truck was moved. It was common ground it was moved before pictures of the aftermath of the Accident were taken.

[38] Both at trial and on his examination for discovery, Mr. Bowers admitted that due to the passage of time, he was unable to recall certain specifics regarding the Accident. This included how well the area of the impact was illuminated, how the other vehicle moved as a result of the impact and where specifically the two vehicles came to rest on the roadway.

Mr. Shields

[39] Christopher Shields was called as a witness for the plaintiff. He is a career firefighter with the Saanich Fire Department, having spent the last 17 years in that profession. In his role as a fire fighter, Mr. Shields has attended hundreds of motor vehicle collisions.

[40] He has lived in Cobble Hill for 43 years and drives the road where the Accident occurred several times a week and is very familiar with the intersection in question.

[41] Mr. Shields was on his way to work and had stopped at a coffee shop on the southeast corner of the intersection where the Accident occurred. When Mr. Shields came out of the coffee shop, he heard a horn going continuously. He looked across the highway and, approximately 200 feet away, saw a white car stopped on the highway, but could not tell what direction it was facing. He immediately crossed the highway to provide aid.

[42] He observed the Volkswagen almost directly under the flashing warning sign in the northbound lane straddling the line between the right-hand turn lane and the shoulder. The truck was behind it and closer to the barrier. He approached the Volkswagen from the back and walked around to the front. He observed heavy damage to the rear driver's side of the Volkswagen. Both the rear passenger taillight and the headlights were illuminated. On cross-examination, he admitted that he did not inspect the taillight closely as his primary focus was on attending to the plaintiff. When shown photos of the car taken after the vehicle was transported to a storage facility, Mr. Shields agreed that the tail light was no longer on the vehicle.
Mr. Shields testified that in his experience as a fire fighter, damaged portions of vehicles are sometimes removed to prepare them to be towed. However, he had no knowledge of whether this was done in this circumstance.

[43] As Mr. Shields could not gain access to the plaintiff through the driver's side, he walked around to the passenger side to enter the Volkswagen to hold up the plaintiff's head. He wanted to immobilize the plaintiff in the event he had sustained a spinal injury.

[44] Mr. Shields testified that the road where the Accident occurred is a straight stretch of road and the intersection was very well-lit. He was not concerned about being hit by oncoming traffic while attending to the plaintiff. While inside the

Volkswagen, he observed that both the radio and the dash lights were on and the horn was still sounding.

[45] Once first responders attended, he provided a report on the plaintiff's condition and left the scene.

Mr. Beck

[46] Mr. Beck was called as witness for the plaintiff. At the time of the Accident, Mr. Beck was the Chief of the Mill Bay Fire Department. He has since retired. He attended the scene of the Accident along with his crew.

[47] Mr. Beck testified that because the Volkswagen leaked fuel as a result of the impact, he instructed his crew to pull some hose from the fire truck to be ready to put out any fire that broke out. He also instructed them to disconnect the power cables to the battery of the Volkswagen to eliminate any fire risk from shorting wires. Mr. Beck confirmed that he did a 360-degree check of the Volkswagen for hazards but did not do any further inspection of the vehicle or report on its condition.

Mr. Richards

[48] Mr. Richards was called a witness for Mr. Bowers. Mr. Richards works for a towing company and was called to attend the Accident scene. He has attended numerous accidents on the TransCanada Highway. He arrived 20–25 minutes after receiving the call-out. Mr. Richard testified that it was dark and rainy but could not remember any details about how heavily it was raining. He could not recall if the driver of the Volkswagen was still in the vehicle when he arrived.

[49] Mr. Richards testified that when he arrived, the majority of the plaintiff's vehicle was in the slow lane and that the pick-up truck was ahead of the plaintiff's vehicle on the shoulder. The plaintiff's vehicle was positioned at an angle so that the back corner was angled toward the other through lane. He testified that the plaintiff's vehicle was located before the start of the turn lane but could not specify how far before. On direct, he testified that there were no streetlights above the plaintiff's vehicle. On cross-examination, with reference to photos of the intersection,

Mr. Richards agreed that the overhead lamp standards start where the right-hand turning lane and the concrete barrier begins. He testified that it would not have been possible to move the plaintiff's vehicle before he arrived.

[50] The first time Mr. Richards was asked to relate his evidence about his attendance on the Accident was shortly before trial, when he was served with a subpoena. He admitted that some of his recall of the Accident scene was blurry given the amount of time that has passed.

Dr. Cepus

[51] Mr. Bowers relied on a report from Dr. Cepus, who was qualified as a metals and materials engineer able to give an opinion on failures in materials, components, machines, and processes. Dr. Cepus was asked to give an opinion on the plaintiff's claim that a failure of the heater core caused his vehicle to suddenly lose power, the effect that such a failure would have on the operation of the vehicle generally and, specifically, its effect on the operation of the tail and signal lights.

[52] Dr. Cepus did not attend the scene of the Accident and had no opportunity to examine the plaintiff's vehicle. He relied entirely on documents and photographs provided to him by counsel.

[53] Dr. Cepus opined that the plaintiff's description of the vehicle filling with steam that fogged up the windows is consistent with a blown heater core. In this situation, the steam is typically mixed with antifreeze which coats the windows and reduces visibility.

[54] Dr. Cepus' opinion is that a heater core failure, in and of itself, cannot cause a sudden loss of power. He opined that the heater core failure likely resulted in a loss of coolant and that this, in turn, could have caused a:

1) loss of coolant resulting in a dry engine coolant temperature sensor ("ECT") (the ECT should always be fully submerged in coolant and will not operate properly if it is not);

2) loss of coolant resulting in an overheating engine leading to engine seizure;

3) faulty ECT resulting in a hot engine or heater core causing eventual heater core failure; or

4) faulty or dry running ECT resulting in engine stalling or rough running.

[55] Dr. Cepus opined that ECT issues in this model of Volkswagen can cause low engine power. He explained that under normal operating conditions, the battery is used only to start the car. Once started the battery does not supply electricity for engine operation and the electricity comes from the alternator. His opinion is that the electrical system could have been compromised by the engine stalling out, as the alternator may have stopped supplying electricity. When this occurs, the battery has limited capacity to supply all of the electrical requirements of the vehicle, and it is conceivable that the lighting would have been compromised as a result. He agreed that if the issue was confined to the alternator, the lights would still be illuminated but dimmed.

[56] He also opined that if the heater core failure caused a leak and fluid came into contact with electrical components or fuses, it could have resulted in a short circuit and a complete loss of all lighting. On cross-examination, he conceded that observations of the headlights being on, the radio playing and the horn sounding would rule out a short circuit. He also conceded that he had no information as to the health of the battery or the state of the alternator. He also had no information that the Volkswagen was running rough or that the steering was compromised in the moments leading up to the impact.

ANALYSIS OF LIABILITY

[57] To determine liability in this case, there are two questions to resolve:

1) Was the Accident caused, in whole or in part, by the negligence of Mr. Bowers?

2) If so, should liability be apportioned on the basis of the plaintiff's negligence?

Credibility and Reliability

[58] Credibility is central to the assessment of liability in this case. In *Brodie v. Khangura*, 2022 BCSC 1316, Justice Veenstra helpfully outlined the relevant principles which must guide the court in this assessment:

> [88] Reliability and credibility are related but distinct concepts. The distinction between them was considered in *R. v. Morrissey*, [1995] O.J. No. 639, 22 O.R. (3d) 514 (C.A.) at para. 35, cited in *United States v. Bennett*, 2014 BCCA 145 at para. 23:
>
> > Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. …
>
> [89] In considering credibility, the evidence of a witness must be assessed for "its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 at 357 (C.A.).
>
> [90] A frequently cited list of factors in assessing evidence as to both the veracity of a witness and the accuracy of that witness' evidence is found in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296. It includes:
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> > a) The ability and opportunity of the witness to observe events;
> >
> > b) The firmness of their memory;
> >
> > c) Their ability to resist the influence of interest to modify their recollection;
> >
> > d) Whether their evidence harmonizes with independent evidence that has been accepted;
> >
> > e) Whether the witness changes their evidence during cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in their recollection;

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

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

h) The demeanour of the witness generally.

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

[59] I have taken these taken these factors in consideration in assessing the evidence of the various witnesses in this matter.

Lay Witnesses

[60] The material conflicts in the evidence largely centre around where in the roadway the vehicles were when the impact occurred and whether the tail lights of the plaintiff's vehicle were on prior to the collision. In the absence of accident re-construction evidence and clear photographs showing the precise location of the vehicles after the collision, the issue of liability largely turns on the evidence of the plaintiff and defendant and those who came to the scene after the impact.

[61] I have concluded that the evidence of Christopher Shields is the most reliable evidence as to the position of the vehicles on the roadway immediately following the impact and to the question of whether the plaintiff's taillights were operational. As to these issues, I prefer the evidence of Mr. Shields over that of Mr. Richards and Mr. Bowers. Mr. Shields gave his evidence in a forthright manner. His evidence was elicited in direct through open-ended questions, and he provided detailed answers relating what he observed and the actions he took at the scene.

[62] While both Mr. Shields and Mr. Richards in their respective professions as a fire fighter and a tow truck driver have attended the scenes of a very large number of accidents, it is reasonable to infer that this occasion was more memorable for Mr. Shields given that he was off-duty getting a coffee when he decided to attend the scene to assist. This is not an everyday occurrence. Given his status as a bystander, there is an absence of any influence to alter his recollection.

[63] Mr. Richards, on the other hand, recalled some details of the Accident scene and, understandably, given the passage of time, admitted that his recollection was blurry on others. At times, his evidence was inconsistent with other unconverted evidence. For example, his recollection that the concrete barrier started before the beginning of the right-hand turn lane is not consistent with the photographic evidence of the intersection, which clearly depicts that the start of the barrier coincides with the start of the right-hand turn lane. Further, his evidence that the plaintiff's vehicle was positioned in the slow lane with one corner straddling the fast lane is inconsistent with scene photographs showing the plaintiff's vehicle straddling the solid line demarcating the shoulder.

[64] On the issue of the positioning of the vehicles, I also prefer the evidence of Mr. Shields over that of Mr. Bowers who testified that the impact occurred before the commencement of the right-hand turn lane. Mr. Bowers' recollection of some details of the Accident were not firm. For example, on the critical question of the distance between his truck and the plaintiff's vehicle when he first saw it, he was unable to provide an answer. He testified that by the time he saw the plaintiff's vehicle, he had no time to avoid it. At times, he was not a careful witness. In cross-examination, he agreed that there are several street lamps on both sides of the highway. He was then asked whether this was a well-lit intersection and responded that he could not recall. He then conceded that it is not a dark intersection. Given that Mr. Bowers travelled through this intersection on a daily basis, his equivocation on this point is unreasonable and inconsistent with the photographs of the intersection.

[65] I also prefer the plaintiff's evidence as to the positioning of his vehicle just prior to impact over that of Mr. Bowers. Mr. Bowers' evidence on this central issue was lacking in detail and was largely elicited through leading questions. In contrast, the plaintiff gave his evidence in a forthright, detailed and careful manner. Given the fact that he was having mechanical difficulties with his car and was trying to pull off the road and the significance that the Accident has played in his life, it is reasonable that he would have a detailed recollection of the specifics of where he was located in the roadway. In considering this evidence, I have taken into account that, by the time

he came alongside the barrier, the plaintiff's visibility was obscured by the build up of steam. As such, his evidence as to the positioning of his vehicle prior to the impact cannot be relied upon in isolation. His evidence on this point is corroborated both by the photographic evidence and the evidence of Mr. Shields.

[66] With respect to the question of whether the tail lights of the plaintiff's vehicle were illuminated, I prefer the evidence of Mr. Shields over the evidence of Mr. Bowers, in part, for the reasons already stated. In addition, as I will discuss below, I do not find Mr. Bowers' evidence on this point to be in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Brodie* at para. 89.

Expert Evidence

[67] I am unable to place much, if any, weight on Dr. Cepus' opinion that the mechanical issue in the plaintiff's vehicle was related to the possible mechanical failures outlined in his report. He did not have the opportunity to examine the plaintiff's vehicle. Moreover, the explanation relied upon by Mr. Bowers to support the theory that the tail lights were not operational depends, in part, on the assumption that the battery and the alternator were also compromised. However, as Dr. Cepus concedes in his report, he had no information about the state of these components. While the report provides some possible causes for the mechanical failure, it does not provide persuasive evidence that assists me in determining whether the tail lights were operational at the time of the Accident.

Legal Framework Applicable to Liability

[68] In rear-end collisions, the driver following a vehicle has a duty to drive with due care, which includes making reasonable allowance for the possibility that unexpected hazards may arise. Included within this duty is the requirement to maintain a safe distance from any vehicle in front of them: *Chauhan v. Welock*, 2020 BCSC 1125 at para. 64.

[69] These duties are reflected in ss. 144(1) and 162(1) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318:

> **144** (1) A person must not drive a motor vehicle on a highway
>
> (a) without due care and attention,
>
> (b) without reasonable consideration for other persons using the highway, or
>
> (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.
>
> …
>
> **162** (1) A driver of a vehicle must not cause or permit the vehicle to follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the amount and nature of traffic on and the condition of the highway.

[70] The court held in *Wallman v. John Doe,* 2014 BCSC 79 at para. 411 that "driving with due care and attention assumes being on the lookout for the unexpected."

[71] Some have described the imposition of this duty as reversing the onus to the following driver to prove that he was not at fault for the collision: *Dubitz v. Knoebel,* 2019 BCSC 1706 at para. 242. In *Chauhan* at para. 65, Crerar J. held that this "should not be taken as reversing the legal burden of proof where the rear driver is the defendant." Instead, the presumption arises from the fact that the rear-end collision itself is *prima facie* evidence that the rear driver failed to keep a safe distance and was driving without due care and attention.

[72] This presumption does not apply when a following driver encounters unforeseen conditions: *Dubitz* at para. 242. In those circumstances, the question becomes whether the rear driver's conduct met the applicable standard of care given the conditions at the time of the accident and any reasonably foreseeable risk of harm arising from those conditions. In making this assessment, the following factors are relevant (see *Biggar v. Enns*, 2017 BCSC 2290 at para. 46, citing *Ayers v. Singh,* [1997] B.C.J. No. 350 (B.C.C.A.) at para. 10):

> (i) the speed of the rear vehicle; (ii) the distance between the two vehicles as they were driving along; (iii) the actions of the driver in the rear vehicle

> before the emergency arose, and; (iv) the actions of the driver as the emergency arose.

[73] Justice Crerar in *Chauhan* described the standard imposed on the following driver as follows:

> [70] In other words, the standard of conduct required of a following driver must be assessed in light of the circumstances known, or reasonably knowable, to the driver in advance, and not with the benefit of hindsight. While drivers must exercise due care and caution to avoid colliding into vehicles in front of them, they are not required to foresee the unforeseeable. As in all negligence cases, the standard of care is met by reasonable prudence, not perfection.

[74] Where a defendant alleges that the plaintiff's conduct caused or contributed to an accident, the onus is on the defendant to establish causation.

[75] The plaintiff cannot be found negligent if the evidence is such that the collision would have occurred regardless of taking reasonable steps to warn of oncoming traffic. To establish causation, Mr. Bowers must prove that the plaintiff's failure to take reasonable steps to warn other motorists by activating his hazard lights or by failing to have his tail lights illuminated caused, or contributed to, the plaintiff's loss.

DECISION ON LIABILITY

[76] Given my assessment of the evidence discussed above and the applicable law, I find that the plaintiff has established on a balance of probabilities that the tail lights of his vehicle were operational at the time of the impact and that his vehicle was either in the right-hand turn lane or partly on the shoulder of the road adjacent to the concrete barrier at the point of impact as he was attempting to pull off the highway.

[77] I also find, based on the testimony of Mr. Shields and the photographic evidence, that the area where the impact occurred was well-lit due to the presence of overhead light standards on both sides of the highway, and that the highway was straight and flat.

[78] Mr. Bowers had a duty to keep a look out, even for the unexpected. This duty was heightened given that Mr. Bowers was contending with wet and dark driving conditions. These are not unusual conditions for January on Vancouver Island, but if, as Mr. Bowers' testified, these were the only things impairing his visibility, he had a duty to proceed cautiously and be prepared to bring his vehicle to a stop to avoid hazards in front of him.

[79] The rear-end cases referred to by counsel for Mr. Bowers, where the court concluded that the accident occurred without the defendant's negligence, are all distinguishable on the basis that the rear-ending driver was faced with unforeseeable circumstances. While the defendant will not be held responsible where the circumstances were unforeseeable, what is foreseeable is dependent on the specific facts of each case.

[80] In this case, it may have been unexpected, but it was not unforeseeable that Mr. Bowers could encounter the plaintiff's vehicle experiencing mechanical trouble while driving on a well-travelled highway. While it was early in the morning with light traffic, this is the main highway on the Island. As such, it stands to reason that drivers on the TransCanada Highway may be more likely to encounter situations involving vehicles in distress.

[81] Mr. Bowers' evidence that he only noticed the plaintiff's vehicle before it was too late to avoid a collision, combined with evidence that the intersection was well-lit and that the road is flat and straight, leads me to conclude that the inability of Mr. Bowers to avoid a high speed rear-end collision is *prima facie* evidence of Mr. Bowers' negligence. Mr. Bowers breached his duty to drive with due care and attention and in consideration of others using the roadway. Mr. Bowers has not called sufficient evidence of any other explanation for the collision to dislodge this presumption.

[82] Turning to the argument that the plaintiff's negligence contributed to the Accident, Mr. Bowers submits that the plaintiff was negligent on two counts. First, the plaintiff admitted that he made the initial decision to head to the left-hand turn

lane and then changed his mind. Had he not done so, it is submitted that he would have made it safely to the shoulder before the collision. However, the weight of the evidence is that the plaintiff's vehicle was likely either completely on the shoulder or straddling the solid line between the right-hand turn lane and the shoulder when the Accident occurred. At the same time, Mr. Bowers maintains that he was intending on travelling straight through the intersection in a through lane. Both of these things cannot be true. Given my findings above, it is more likely than not that Mr. Bowers strayed into the right-hand turn lane before the Accident. Further, given Mr. Bowers' evidence that he did not see the plaintiff's vehicle until the last second, I conclude that the plaintiff's lane changes played no role in causing the Accident.

[83] The second argument is that the plaintiff was negligent for failing to activate his hazard lights. The plaintiff readily conceded in his testimony that he did not activate his hazard lights prior to the impact. Given the lighting in the intersection, again combined with Mr. Bowers' failure to see the plaintiff's vehicle on a straight flat stretch of highway until he did not have sufficient time to avoid the Accident, I am not satisfied that Mr. Bowers was keeping a sufficient lookout such that he would have seen the hazard lights had they been activated. Thus, I am unable to determine, on a balance of probabilities, whether the plaintiff's failure to activate his hazard lights had any causative role in the Accident.

[84] I find Mr. Bowers solely liable for the Accident.

EVIDENCE REGARDING THE PLAINTIFF'S INJURIES

The Plaintiff's Pre-Accident Life

[85] The plaintiff was born in Alberta and was raised on several small farms. As his father raised horses, he learned how to train them. He worked odd jobs from a young age. Due to the breakup of his parents' marriage, he spent time both in Alberta with his father and in BC with his mother. He left high school in grade 10 and began working full time in a body shop. As a young adult, he worked a variety of jobs in roofing, auto wrecking, construction, warehousing and trucking. He built docks for

a pile driving company. During a layoff from that job, he obtained his scuba ticket and got a job with a fish farm which required him to live in a camp away from home.

[86] At the age of 21, the plaintiff got a job with a steel company in Victoria which sparked his interest in welding. After being laid off from that job due to an equipment failure, he decided to go to Camosun College and obtained his first welding ticket, at a level C. In 1993 he obtained a level B welding ticket with a red seal which allowed him to work in other provinces.

[87] The plaintiff worked in various local Victoria welding shops that would hire him for the duration of a project contract. For the period of 1993 to 2000, he moved from shop to shop based on the availability of work. He would be laid off from one shop when its work dried up and then work for a competitor who had contracts to complete. Sometimes, he worked two different shifts at two different shops when there was a high need for welders in his trade. During this period, he also obtained his pipe pressure ticket, which allowed him to do more specialized welding work.

[88] In 2002, the plaintiff completed a metal fabricating apprenticeship, again with a red seal. Due to the end of his first marriage, the plaintiff returned to Alberta and travelled back to BC frequently to see his two children. During this period, he worked at various machine and welding shops in Alberta.

[89] In 2005, he relocated back to BC settling on an acreage near Ladner. He worked in local machine shops, for Tristar Industries for two years doing TIG welding, which requires precise eye-hand coordination, and then with Canadian Rubber and Steel until the work ended. Needing to find work, he went to Fort McMurray to work at a mining operation where he lived in a work camp.

[90] Around this time, the plaintiff met his second wife, Danielle, and ultimately, decided that living in the camp work was too hard on their relationship. To be closer to home, he focused on finding work in the Lower Mainland. He joined the Longshoreman Union, which employs many trades and operates out of the Delta, Coal and Fraser River ports. He worked at this for approximately one year, but he

found that the shifts were not as consistent and regular as he had hoped, and it became more and more difficult to support himself and his family.

[91] While living in Ladner, the plaintiff's children spent every second weekend with him and extended time during their breaks from school. Together, they built go karts and did other projects in his shop. The plaintiff acquired three horses that he rode with his daughter and his wife.

[92] In 2009, the plaintiff and his wife relocated to Vancouver Island to be closer to his children and with the aim of finding more steady employment. Instead of obtaining employment in the areas of his certifications, he took a caretaker job on an alpaca farm near Parksville. To make ends meet, he took on project work at a small local welding shop and cut and sold firewood. He continued to spend time with his children particularly outdoors, camping, fishing, motor biking and trail riding.

[93] The plaintiff and his wife relocated again to Victoria in 2011 so that his daughter could move in with them while she finished high school. He secured employment as a metal fabricator working on ferry docks and obtained his crane certificate. After two years, he left that job for a series of other metal fabrication jobs with different companies. He left some of these jobs due to difficult co-workers, but he also was well connected within the industry and frequently obtained jobs through referrals from friends.

[94] In 2016, the plaintiff and his wife relocated to the Malahat area and moved into a larger house so that his father could live with them. He was still working in Victoria at this time. A change in the timing of his shift lengthened his commute. This, together with high fuel costs, led him to take on a less well-paid position as a truck driver closer to home. During this period, he also worked on call with Pacific Mills doing metal fabricating and welding work during mill and factory shutdowns.

[95] The plaintiff's income fluctuated as a result of his frequent change in employment. The economist report tendered by the plaintiff states that in the four

years prior to the Accident, the plaintiff reported a high of $49,581 (in 2015) and a low of $42,182 (2017) in employment income.

[96] Prior to the Accident, I accept that the plaintiff was a hard working and conscientious individual who generally worked full time to provide for his family with some periods of under-employment. He had a history of upgrading his qualifications but, at times, worked for lengthy periods in positions that did not require his certifications. His work history is such that he frequently changed his jobs to take advantage of better pay or benefits, or to relocate for personal or family reasons. Sometimes, he chose work with less pay to gain other advantages.

[97] There is some evidence that just prior to the Accident, the plaintiff was contemplating going back to school to get his millwright certification because he did not think that truck driving would set him up well for retirement. He testified that this would increase his employability and would allow him to work in institutional environments such as hospitals and manufacturing plants. In his view, these environments would allow for a slightly lighter workload where you get paid more for your skills than your ability to undertaken physical tasks. He described the mill environment where he was working at the time of the Accident as a rough environment that he did not plan on staying in forever.

[98] Danielle Baragar testified that prior to the Accident, she had discussed with her husband generally the possibility of trying to find a more permanent position and the possibility of him obtaining his millwright certification. However, there was no evidence that concrete steps were taken in this regard.

[99] The plaintiff testified that he was a regular beer drinker prior to the Accident, sometimes consuming six beers a day.

The Plaintiff's Injuries

[100] Christopher Shields, the off-duty firefighter who arrived first to the scene, gave evidence that the plaintiff was very groggy during their interaction. Mr. Shields introduced himself and tried to engage the plaintiff in conversation to keep him from

going into shock, but the plaintiff did not always respond. The plaintiff asked him repeatedly what happened. As he was holding the plaintiff's neck from behind, Mr. Shields was unable to observe the plaintiff's face to assess his level of consciousness, but the plaintiff seemed to be drifting in and out. He continued to hold the plaintiff in this position until first responders arrived.

[101] As a result of the Accident, the plaintiff sustained severe abrasions to the back of his head from which glass had to be removed. He suffered bruises to his eyes as well as bruises and a minor abrasion on his arm. He had a pounding headache when he was taken to the hospital. After few hours he experienced soreness in his neck, shoulders and back.

[102] The plaintiff's initial symptoms included dizziness, severe stiffness, headaches, sore shoulders, loss of focus and loss of eye-hand coordination. He was unable to do much for the first week and a half. After that he was able to get up and go downstairs to his shop to have a cigarette.

The Plaintiff's Abilities and Health Post-Accident

[103] During the following several months, the plaintiff says that he tried to resume tasks such as small projects in his shop but found it too difficult due to dizziness and headaches. The soreness in his shoulders subsided, but he was unable to maintain his focus due to headaches. He also noticed difficulties with his manual dexterity and became concerned that he no longer had the steady eye-hand coordination required for welding. He testified that driving was almost impossible as it caused extreme headaches and dizziness. As a result, he did not feel that it was safe to drive.

[104] In August 2018 he attempted to return to work as a driver at Creed Trucking. As the number of trips in his first shift increased, he experienced dizziness and disorientation to the point where he felt it was unsafe for him to continue as he could not be sure of the position of his truck on the road. He tried to return again two to three months later with shorter trips. Similar symptoms returned, and he again felt unsafe to drive.

[105] Finding it difficult to explain his cognitive symptoms to friends and family, the plaintiff developed a demonstrative aid of three jars with water, rocks and varying levels of soil. When the jar with clean rocks is shaken, the water gets slightly disrupted but clears quickly, which he equates with a normal state.

[106] For the year after the Accident, he described his symptoms as being consistent with the jar with the most soil, which takes a very long time to clear after being shaken. This changed dramatically when he was received vision therapy and vestibular training and was prescribed special glasses for driving. He also found relief of neck tension with physiotherapy treatments. Occupational therapy helped him learn to build up to tasks and pace himself. He found it helpful to talk to someone who understood what he was going through.

[107] After this treatment, his symptoms have, for the most part, been consistent with the middle jar. There is always a bit of cloud in the jar, and the more physical activity he does to shake his jar, the cloudier it gets and the longer it takes to clear. Shaking the third jar represents the state where he can no longer function and it would take days or weeks of rest sufficiently to settle, which still occurs when he has overdone it.

[108] The plaintiff explained that while there has been improvement in his soft tissue injuries, fatigue and physical activity continue to trigger headaches and dizziness, which, in turn, make it more difficult to process information. He continues to experience incidents of nausea. He finds social events with noise and people talking also triggers his symptoms.

[109] A year and a half following the Accident and after getting some relief through treatment, the plaintiff found a part-time job doing hotel maintenance through his friend, Dave Mobey. Mr. Mobey was understanding of the plaintiff’s injuries and his need for accommodations such as taking breaks between tasks. He ended up leaving this job in February 2020 because his income from three shifts a week was not enough to justify the time lost with his family.

[110] In March 2020, the plaintiff obtained a part-time job with an excavation company driving truck. He continued to have symptoms doing this job but pushed through them by taking Advil and Gravol to control his headaches, dizziness and nausea and by resting at home at the end of his shift and having days in between his shifts to recuperate. He left this position in 2021.

[111] The plaintiff tried welding projects at home but found that the quality of his welding was poor and that projects would take him much longer than they used to. He helped his son build a trailer for his jet skis, which took him six months to complete. He testified that prior to the Accident, he could have completed this in a full weekend and a couple of evenings.

[112] In 1996, the plaintiff had worked briefly for Seaspan at the Victoria Shipyards doing temporary shifts when the shops he worked in were slow. In his experience, Seaspan frequently laid off staff, and there were numerous safety concerns, making Seaspan an undesirable place to work. Through discussions with friends in early 2022, the plaintiff learned that Seaspan had changed considerably making it a more desirable place to work with more job security and wages and benefits that were the best in Victoria for workers with his certifications. He decided that Seaspan would be a good job to retire from given the pension benefits.

[113] Based on this information, in March 2022, the plaintiff applied for a job at Seaspan and was hired immediately into a full-time fabricator ship fitter position. This position did not require welding but was physically demanding and entailed frequent crouching and kneeling. On cross-examination, the plaintiff agreed that the conditions at Seaspan would be difficult even for a healthy man in his fifties.

[114] A co-worker, Michael Timms, provided evidence that the plaintiff did high quality work as a fitter with Seaspan.

[115] Over the next few months, the physical nature of the work brought on the plaintiff’s symptoms to the point where he had to leave work to go home to rest. He described an incident in August 2022 where he was down in the hull of a ship and

became so dizzy and disoriented that he required assistance to climb the ladder out of the ship. Thereafter, he had to call in sick on a number of occasions because he was light headed and dizzy and did not feel safe enough to go to work.

[116] Eventually, his supervisor told him that he could not return to work unless a doctor certified that he would not be a danger to himself or others. the plaintiff was terminated on September 9, 2022.

[117] During the time he worked at Seaspan, he had to spend the entire weekend resting to be able to return to work the following week. After he left Seaspan, his symptoms had flared up to the same point as shortly after the Accident, and he had little energy to do anything. Emotionally, this was frustrating and depressing because he felt like he was back to square one in his recovery. He returned to physiotherapy and occupational therapy. The physiotherapy assisted with physical symptoms, and he found the occupational therapy particularly helpful to learn strategies to deal with the emotional aspects of his setback.

[118] In March 2023, the plaintiff got another maintenance job through Mr. Mobey at the Best Western Chemainus. He was working in this position at the time of trial. This work entails repairs, painting, snow removal, landscaping and general maintenance. He works five days a week, Wednesday to Sunday. He overlaps three days a week with Mr. Mobey. He continues to suffer symptoms at work, but Mr. Mobey is accommodating and allows the plaintiff more time to complete tasks and more time to rest. The plaintiff testified that he takes one full day on the weekend to rest in order to manage his symptoms. As a result, he spends less time on household chores, with his wife and with his family and friends.

[119] Mr. Mobey corroborated the plaintiff's evidence that he needs accommodation to pace tasks and take more frequent breaks. Mr. Mobey described the plaintiff as a valued employee who does quality work. While Mr. Mobey would like to keep the plaintiff employed, this is the owner's decision to make. Mr. Mobey testified that there have been comments from other staff members at the hotel that the plaintiff takes an unreasonable amount of time to complete certain tasks.

[120] In terms of his life outside of work, the plaintiff avoids going to see his son's band or other concerts because the noise aggravates his symptoms. While he and his wife still host and attend family events, he requires help from family to set things up, and he often has to retreat to a quiet place during the event to get away from the noise. He and his wife rarely see friends socially.

[121] The plaintiff's daughter, wife and a family friend gave evidence that corroborated that the plaintiff has done less fishing, camping and outdoor activities since the Accident. His wife, in particular, testified about the impact of the plaintiff's injuries on their social life. She observes that he spends most of his time recovering from work and doing what he can around their home. He has very little energy left to devote to outings with friends. Family and friends also testified that the plaintiff does not read very much or play card games, activities he enjoyed before the Accident.

[122] The plaintiff's alcohol consumption was put into issue by Mr. Bowers. The plaintiff testified that he has always been a moderate beer drinker, typically enjoying a couple of beer after work or while cutting his lawn. His wife testified that prior to the Accident, he could drink up to six beers a day.

[123] The plaintiff admitted that his beer consumption doubled after the Accident, particularly in its immediate aftermath when he was not working. The Accident threw off his sleeping patterns, and he began to drink a lot more to relieve or mask his symptoms. As he explained, it produced a "cloudy feeling that I understood." He said that the feelings he gets with his symptoms are almost "like being intoxicated without being intoxicated" and he could not understand why he was feeling that way. He explained, "whereas if I've drank eight or nine beer I understand why I'm feeling like this. And it just sort of helped me grasp the feeling and mask it off a bit I guess. It was like a self-medication for me."

[124] The plaintiff was not pursuing any form of treatment as of the date of trial. He explained that he is presently coping with his symptoms but testified that he would pursue treatment if his symptoms flared up. When asked about certain strategies such as meditation recommended by Michael Smith, the occupational therapist, the

plaintiff indicated that he is willing to try anything that might improve his symptoms. The plaintiff was not aware that the independent medical reports suggested that he was suffering from depression and anxiety. He has no plans to pursue counselling but would do so if he started to show symptoms. Similarly, he was not aware that it had been suggested that he see a headache specialist. On cross-examination, the plaintiff admitted that he had been advised to address his alcohol consumption but the details of this were not further explored in his evidence at trial.

EXPERT EVIDENCE REGARING INJURIES

The Plaintiff's Experts

[125] The plaintiff tendered evidence from five experts; Dr. Medvedev, a neurologist; Dr. de Ciutiis, a physiatrist; Michael Smith, an occupational therapist; Karen Cross, a vocational rehabilitation consultant; and Robert Wickson, an economist.

[126] Neither Dr. Medvedev nor Dr. de Ciutiis are treating physicians. Both conducted independent medical assessments of the plaintiff in November 2023 and February 2024 respectively. Notably, Dr. de Ciutiis examined the plaintiff at the request of the Insurance Corporation of British Columbia ("ICBC"), yet his report was tendered by counsel for the plaintiff.

[127] Dr. Medvedev conducted neurological tests with normal results. Nevertheless, Dr. Medvedev noted that the plaintiff continues to be symptomatic with motion-dependent imbalance and post-traumatic headaches. Screening tests for anxiety and depression demonstrated mild to moderate degrees of both.

[128] Dr. Medvedev diagnosed the plaintiff with a concussion that arose as a result of the collision and the development of post-concussive syndrome with cognitive, psychiatric and physical manifestations. He identified the plaintiff's physical symptoms as including visual dysfunction making it difficult for him to follow rapidly moving objects and producing a sense of instability and dizziness. He also concluded that the plaintiff continues to experience personality changes affecting his

recreational interests and his ability to perform his work. He had recovered most of his capacity for domestic activities.

[129] Dr. Medvedev is of the opinion that the plaintiff is unlikely to experience a complete resolution of his symptoms and the time needed to achieve the maximum attainable recovery is uncertain.

[130] The plaintiff reported to Dr. Medvedev that he consumes eight beers a day. Dr. Medvedev testified that while this level of consumption is a barrier for recovery, the constellation and quality of symptoms described by the plaintiff are not in keeping with the toxic effects of alcohol. On cross-examination, Dr. Medvedev testified that if he was a treating physician, he would counsel the plaintiff to reduce his consumption. However, I heard no evidence as to whether Dr. Medvedev actually counselled the plaintiff to reduce his consumption.

[131] Dr. Medvedev recommends that the plaintiff receive treatment for depression and anxiety and preventative treatment for headaches either through oral agents or injectable therapies. He was of the opinion that if appropriate treatment was pursued, some improvement would occur but how long this would take is uncertain. On cross-examination, Dr. Medvedev agreed that, if treatment recommendations are followed, there was some prospect for the plaintiff to improve both his domestic and employment functionality. He also agreed that if the plaintiff were to find work that was less physical, it may be helpful, but he deferred to occupational specialists to provide guidance as to the best possible employment.

[132] Dr. de Ciutiis is a medical doctor with a specialty in physical medicine and rehabilitation and, through his role as medical lead for a concussion clinic, focuses on the treatment of patients who have suffered concussions. He bases his opinion primarily on the history provided to him by the plaintiff and the post-accident clinical documentation. He also performed a neurological examination of the plaintiff which was normal except that dizziness was triggered when the plaintiff looked to the reaches of his left and right visual fields.

[133] Dr. de Ciutiis is of the opinion that given the mechanism of the Accident, the reported symptoms, as well as supportive post-accident clinical documentation, the plaintiff sustained a concussion which probably has resulted in post-concussive syndrome. Similar to Dr. Medvedev, he is of the opinion that the plaintiff is unlikely to achieve a complete resolution of his symptoms. He also opines that the Accident likely caused mood disruption and anxiety.

[134] In respect of his work capacity, Dr. de Ciutiis is of the opinion that the plaintiff's report of being unable to return to truck driving and welding is consistent with the injuries he sustained in the Accident and that he will be unable to return to work in this capacity in the future. He opined that while the plaintiff would be best suited to vocations that required less physicality, he has demonstrated an ability to engage vocationally on a sustainable basis at his current employment so long as he paces himself and modifies his tasks to avoid aggravating his symptoms.

[135] The plaintiff also reported to Dr. de Ciutiis that he consumes eight beers a day. Dr. de Ciutiis testified that this is excessive as compared to the recommended guideline and this level of consumption could be impairing his recovery. However, even absent alcohol use, given the severity of the impact sustained in the Accident, it is Dr. de Ciutiis' opinion that the plaintiff would still have a degree of ongoing symptoms. I heard no evidence that Dr. de Ciutiis discussed with the plaintiff the impact of his alcohol consumption or that he counselled him to reduce his alcohol consumption.

[136] In terms of treatment, Dr. de Ciutiis recommended consistent moderate to vigorous exercise, referral to a headache specialist, follow up with his family doctor regarding his mood, a cognitive functional capacity evaluation and an ergonomic workplace assessment.

[137] Karen Cross was qualified as an expert in vocational rehabilitation specializing in the vocational assessment, counselling and support of people returning to employment after injury and illness. Ms. Cross was initially retained by ICBC in November 2023 to provide vocational counselling and exploration services

to the plaintiff. At this point, the plaintiff was working part time as a hotel maintenance worker. Ms. Cross conducted a vocational evaluation to identify suitable work for the plaintiff.

[138] Ms. Cross' report has some limitations. First, at the time it was prepared, this report was not intended to be an expert report although I admitted it as an expert opinion during a *voir dire*. Secondly, Ms. Cross admitted on cross-examination that if she had prepared this report as an expert opinion, she would have based it, in part, on a functional capacity evaluation of the plaintiff's physical limitations. However, such an assessment was not approved as a Part 7 expense by ICBC. Instead, a description of the plaintiff's functional limitations was provided to Ms. Cross in an email from the plaintiff's occupational therapist, Ms. Brussow. This email itself is not part of the report, but the description of the functional limitations is reproduced in the report. Many of the opinions in the report are based on these assumed functional limitations.

[139] Ms. Cross is of the opinion that the plaintiff's current job as a hotel maintenance worker may present challenges for him in terms of his ability to stay in his job long term. Moreover, she is of the opinion that due to the accommodations provided by his current employer which allow him to manage his symptoms, most jobs within this same occupational group would not be available to him should he ever lose his current position.

[140] Michael Smith is an occupational therapist with expertise in performing functional evaluations and assessing the cost of future care of individuals with brain injuries.

[141] Mr. Smith was retained by plaintiff's counsel to carry out a functional and work capacity and cost of future care assessment. In November 2023, Mr. Smith spent almost three days with the plaintiff completing the assessment. He carried out a number of physical tests aimed at assessing the plaintiff's functional capacity both for work and for other activities of daily life. Mr. Smith relied on the diagnosis of traumatic brain injury and post-concussion syndrome as well as a diagnosis of post-

trauma vision syndrome and vestibular dysfunction made by Dr. McCrodan. I heard testimony that Dr. McCrodan provided vestibular therapy and prescribed the plaintiff glasses that enhanced his ability to drive. However, neither an opinion nor any medical records from Dr. McCrodan were entered into evidence.

[142] Based on the plaintiff's demonstrated function in testing, Mr. Smith is of the opinion that he does not meet the full known functional demands for work as a welder or fabricator. In testing, the plaintiff reported dizziness and light headedness particularly with repeated strength tasks and overhead tasks and those requiring bending, crouching or stooping postures. While he found that the plaintiff met the strength and sitting requirements typical of many truck driving positions, the primary constraint in this work would be his reported headache reactivity and visual fatigue.

[143] Similar to Ms. Cross, Mr. Smith is of the opinion that the plaintiff does not have the functional capacity to durably manage work as a maintenance worker without the accommodations he is currently afforded in his present employment.

[144] In terms of the future, Mr. Smith recommends that the plaintiff pursue employment that minimizes cognitive, visual, vestibular and physical functional stressors and, ideally, that allows him the flexibility to take breaks to manage his symptoms. Mr. Smith recommended that the plaintiff would benefit from the oversight of an occupational therapist and vocational consultant.

[145] In terms of future care, Mr. Smith provided a budget for a number of future treatment recommendations based both on the medical reports he reviewed and the functional capacity assessment he carried out. In terms of treatments, Mr. Smith included an annual fitness pass to facilitate an exercise program; as needed passive treatments to manage symptom flare ups, a further vocational assessment, occupational therapy, an ergonomic assessment of his workplace, counselling sessions and vestibular treatment, use of a meditation app and nutrition services. He also included aids and devices to assist the plaintiff with home and yard tasks. Mr. Smith also recommended a yearly budget for hiring contractors to carry out 9–18

hours of household seasonal cleaning, 30–40 hours of yard work and 24 hours of home handyman services. Finally, he included the cost of a driving assessment.

The Defendant's Experts

[146] The only report regarding the plaintiff's injuries tendered by Mr. Bowers is a responsive report to Mr. Smith's report prepared by Sheila Branscombe, an occupational therapist. Ms. Branscombe did not personally assess the plaintiff's physical or cognitive function and confined her evidence to a review of Mr. Smith's report.

[147] Ms. Branscombe's primary criticisms of Mr. Smith's report are that it does not record objective observations that would validate the plaintiff's reported symptoms of light headedness and dizziness produced by various testing and that Mr. Smith, at times, made assumptions about the plaintiff's functionality in the absence of test results to support those assumptions. Ms. Branscombe acknowledged that with more nebulous symptoms like headaches, a functional representation of that symptom may not present in testing results. Accordingly, it is important to record how any reported symptom actually impacted the testing subject's behaviour or appearance.

[148] Ms. Branscombe is in general agreement that many of the items addressed in Mr. Smith's report would support the plaintiff's future care needs. She would not support an amount for passive treatments as literature suggests that they do not improve functional performance and that kinesiology is a preferable treatment. She also questions the need for a second vocational assessment as the plaintiff has already been assessed by Ms. Cross. She also questions the need home repair services given that Mr. Baragar and his wife rent their home.

FINDINGS ON THE PLAINTIFF'S INJURIES

[149] I find the plaintiff to be credible and forthright in providing his evidence regarding the impact of the Accident on his life. He was not prone to exaggerating his challenges and, although he may lack insight into the impact of his injuries on his

mental health, he was generally a reliable historian. He did not evade questions put to him on cross-examination and did his best to provide responsive answers.

[150] There was no serious challenge to the plaintiff's credibility or reliability in reporting his injuries and the impact they have had on his life. While clinical records were put to him from the period after the plaintiff received vestibular treatment and glasses for driving where he reported significant improvement, the course of the plaintiff's recovery has not been linear, and it is apparent that when he tried to resume his former level of employment, he symptoms flared up to the point where he could no longer tolerate it.

[151] Even though the primary medical evidence in this case as to the nature and cause of the plaintiff's injuries has come from medical doctors who assessed the plaintiff on only one occasion and who were retained by counsel to undertake an assessment and prepare a report, counsel for Mr. Bowers does not seriously contest the opinions of Drs. Medvedev and de Ciutiis, which I accept, that the plaintiff suffered a concussion in the Accident and has developed post-concussive syndrome. Nor are the treatment recommendations in those reports disputed. I find those recommendations to be reasonable.

[152] Both the medical and the lay witness evidence presented supports the following conclusions, and I find as facts that as a result of the Accident:

- the plaintiff's vehicle was hit with significant force at high speed which caused extensive damage to his vehicle;
- the plaintiff suffered a scalp laceration, concussion with post-concussive syndrome with cognitive, psychiatric and physical manifestations, post-traumatic headaches, soft tissue injuries to his neck and shoulders and mood disruption;
- his concussive symptoms have not completely resolved and are triggered when he over does it with physical tasks at home and at work;
- the prognosis for a complete recovery is poor although it is probable that appropriate treatments will result in some improvements;

- the plaintiff suffered injuries that have left him unable to return to full-time work in the capacity of a welder, metal fabricator or truck driver;
- any work he will perform in the future will require either less physicality or flexibility to take breaks to manage his symptoms; and
- the quality of the plaintiff's life has deteriorated in that he must prioritize the management of his symptoms over spending time with his friends and family and engaging in social events and the outdoor activities he frequently enjoyed prior to the Accident.

ASSESSMENT OF DAMAGES

Failure to Mitigate

[153] As a general proposition, a defendant should not be held liable for damages that the plaintiff could have reasonably avoided. A plaintiff who has been injured has a positive obligation to take reasonable measures to reduce his or her damages, including pursuing treatment to alleviate or manage symptoms arising from their injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234.

[154] Once the plaintiff has proven that the defendant's negligence caused their injuries, the burden shifts to the defendant to prove on a balance of probabilities that the plaintiff could have or should have reduced their losses. A defendant must prove both that the plaintiff was unreasonable in not pursuing recommended treatment and the extent to which the plaintiff's damages would be reduced if they had acted reasonably: *Chiu v. Chiu,* 2002 BCCA 618 at para. 57.

[155] Mr. Bowers says that the plaintiff has not sought treatment for his diagnosed psychological issues of anxiety and depression, headaches or his reported vestibular issues. Mr. Bowers also points to the fact that the plaintiff smokes and drinks alcohol daily, greatly in excess of the current recommended intake.
Mr. Bowers says that the plaintiff has done very little to rehabilitate himself and that all damages awarded should be reduced by 25% as a result.

[156] The difficulty with Mr. Bowers' position is that many of the recommended treatments were made by doctors who were not treating the plaintiff and there was no evidence that those particular treatments were discussed with the plaintiff. There is also some evidence that tight finances are a concern for the Baragar family and this has played a role in what treatments have been pursued. The evidence of Karen Cross made clear that when treatments were made available to the plaintiff and funded by ICBC, he pursued them with diligence.

[157] With respect to the argument regarding his alcohol consumption, I do not find that Mr. Bowers has met the high burden of proving on a balance of probabilities that if the plaintiff reduced his consumption, his losses would be mitigated: *Haug v. Funk,* 2023 BCCA 110 at paras. 69–72. While both Dr. de Ciutiis and Dr. Medvedev conceded in cross-examination that this level of consumption could be a barrier to recovery, they did not provide any opinion on whether this was hindering the plaintiff's recovery. In my view, the general statements elicited during cross-examination are not sufficient to meet the significant evidentiary burden on Mr. Bowers to prove a failure to mitigate. Importantly, Dr. de Ciutiis, who was retained by Mr. Bowers (despite the fact that it was tendered by the plaintiff), was not asked to address this issue in his expert report.

Loss of Housekeeping and/or Handyman Capacity

Legal framework

[158] In *Ponych v. Klose*, 2023 BCSC 1504 at paras. 328–329, Justice Blake helpfully synthesized the recent guidance on loss of housekeeping capacity awards provided by the Court of Appeal in *McKee v. Hicks*, 2023 BCCA 109:

> [328] A plaintiff is entitled to an award for loss of housekeeping capacity if they establish on a balance of probabilities such a loss: *Kim v. Lin,* 2016 BCSC 2405 at para. 189, aff'd 2018 BCCA 77. An award may be made under one or more separate heads of damage, including pecuniary, non-pecuniary, and cost of future care.
>
> [329] The principles applicable to the loss of homemaking capacity are:
>
> - Loss of housekeeping capacity may be treated as a pecuniary or non-pecuniary award. This is a question of discretion for the trial judge.

- A plaintiff who has suffered an injury that would make a reasonable person in her circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages.
- Where the loss is more in keeping with a loss of amenities or increased pain and suffering while performing household work, a non-pecuniary damages award may instead compensate the loss.
- As the award is intended to reflect the loss of a capacity, the Plaintiff is entitled to compensation whether or not replacement services are actually purchased.
- Evidence of the loss of homemaking capacity is provided by the work being performed by others, even if done gratuitously.

Discussion

[159] The plaintiff seeks a separate award in the amount of $77,013.27 to cover the cost of seasonal cleaning, yard work and home repairs (see Table D Wickson). Mr. Bowers takes the position that no separate award under this head is warranted.

[160] The plaintiff is able to perform handyman services and does so in his present employment. The issue is that he often has little energy left to do similar jobs and yard work at home. He is capable of doing these tasks; however, depending on his symptoms, it takes him longer to complete those tasks. Dr. Medvedev was of the opinion that the plaintiff has recovered most of his capacity for domestic activities.

[161] I find that the evidence is more in keeping with a loss of amenities or increased pain and suffering and exercise my discretion to consider loss of housekeeping capacity in my assessment of non-pecuniary damages.

Non-pecuniary Damages

Legal framework

[162] Non-pecuniary damages compensate the plaintiff for pain, suffering, disability, and loss of enjoyment of life. Non-pecuniary loss encompasses losses suffered to the date of trial and those suffered into the future: *Tisalona v. Easton*, 2017 BCCA 272 at para. 39.

[163] It is not the gravity of the injury, in and of itself, that determines the value of the award. The impact of the injury must be considered in the context of the plaintiff's specific circumstances: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100. The Court in *Stapley* identified common factors influencing an award of non-pecuniary damages. They include: the plaintiff's age; the nature of the injury; the severity and duration of pain; level of disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle. Stoicism can also be a factor, but care must be taken not to penalize a plaintiff when taking it into account.

[164] Although focused on compensating plaintiffs, an award of non-pecuniary damages must be fair and reasonable to each party. Fairness is achieved, in part, through considering awards in comparable cases. Comparable cases, however, serve only as a rough guide. Each case must be decided on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189.

[165] The plaintiff seeks non-pecuniary damages in the range of $235,000 to $285,000 supported by the awards granted in *Adamson v. Charity*, 2007 BCSC 671; *Owen v. Folster*, 2018 BCSC 143; *Ponych v. Klose*, 2023 BCSC 1504; *Timms v. Lucaben*, 2023 BCSC 1119; *Iwasiuk v. Lunsted*, 2021 BCSC 2427; and *Hachey v. Thomas*, 2022 BCSC 545.

[166] Mr. Bowers says that non-pecuniary damages in the range of $110,000 to $130,000 is more appropriate and points to the awards in *Laurin v. Tiemer*, 2022 BCSC 847; *Holdershaw v. Summers*, 2020 BCSC 1317; *Broomfield v. Lof*, 2019 BCSC 1155; *Ingram v. Munroe*, 2019 BCSC 234; *Reimer v. Bischoff*, 2015 BCSC 1876; and *Wiles v. Seabrook*, 2019 BCSC 13.

Discussion

[167] I find that many of the cases cited by Mr. Bowers deal with injuries and circumstances that are less analogous to the findings I have made regarding the plaintiff's injuries. Some of the cases cited by the plaintiff deal with injuries which

have had a more devastating impact. These include the elimination of any ability to work and the associated damage to self-worth from being unproductive and severe depression leading to suicidal thoughts. Fortunately, this does not accurately describe the plaintiff's circumstances. While it is clear that undertaking his work takes up a significant amount of his energy leaving little left for other activities, the evidence demonstrated that the plaintiff is a valuable employee at his workplace and he has been able to resume some of his recreational and domestic activities. While some mood disorder was caused by the Accident, it is far less severe than some of the cases relied on.

[168] Taking into account the *Stapley* factors as well as the comparative cases cited by the parties, I consider that a reasonable award of non-pecuniary damages is $225,000, which includes an amount for loss of handyman capacity. This amount takes into account the possibility for further improvements once the plaintiff pursues the recommended treatments.

Loss of Earning Capacity

Legal Framework

[169] Damages for loss of earnings from the date of the Accident to trial are to be based on what a plaintiff would have, not could have, earned but for the injuries sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30. To do otherwise would put the plaintiff in a better position had the injuries not occurred.

[170] While the burden of proof for actual past events is on a balance of probabilities, the assessment of how a plaintiff would have fared had they not been injured, both in the period leading up to trial and the future, is necessarily based on a consideration of hypothetical events: *Gill v. Probert,* 2001 BCCA 331 at para. 9, citing *Athey v. Leonati,* [1996] 3 S.C.R. 458.

[171] There is no burden on a plaintiff to prove hypothetical events on a balance of probabilities. Rather, such events are considered by the court when there is a "real and substantial possibility" that such events would occur: *Grewal v. Naumann*, 2017

BCCA 158 at para. 48; and *Rousta v. MacKay*, 2018 BCCA 29 at para. 14. Once it is established that there was a real and substantial possibility, the court must then determine the measure of damages by assessing the likelihood of the event: *Grewal* at para. 14.

[172] It must remain front of mind that the purpose of compensation is to address the loss of capacity, not the actual loss of income: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19. As such, a plaintiff who has returned to their pre-accident level of income may nonetheless have suffered a loss of capacity if there is evidence that, for example, accommodations were required, such as an alteration in work hours, to achieve that level of income: *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.).

[173] The essential task in assessing a claim for future income loss is a comparison of the plaintiff's likely future had the Accident not occurred to their future as altered by the Accident. This is an assessment based on the nature of the injuries and the anticipated employment rather than precise mathematical calculation: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. That said, economic and statistical evidence may assist the court to determine whether a particular award is fair and reasonable in the circumstances: *Gregory* at para. 33.

[174] This task was been broken down into a three-part test by the Court of Appeal in *Rab v. Prescott*, 2021 BCCA 345:

> [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras 93–95.

[175] The Court of Appeal has acknowledged that the third quantification step is often challenging: *Lamarque v. Rouse,* 2023 BCCA 392 at para. 40. Various

approaches have been employed to arrive at the appropriate amount of compensation. Where there is a loss that is easily measured, *i.e*., the plaintiff had a stable career and was unable to work for a period of time and either returned after a period of time off in their full capacity or not at all, it is a relatively simple matter to calculate their lost earnings. On the other hand, where there are a number of variables, such as an irregular or untested employment history, a return to work with limitations on capacity but income that is the same or higher than it was prior to the accident, a capital asset approach may be more appropriate: *Ploskon-Ciesla v. Brophy,* 2022 BCCA 217 at para. 16.

[176] The court may also take into account contingencies as explained by Justice Horsman in *Rattan v. Li,* 2022 BCSC 648:

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

[177] However, the Court of Appeal in *Steinlauf* at para. 84 cautioned that deductions for contingencies should "not duplicate a reduction arising from a relative likelihood analysis."

[178] There are at least three acceptable means to arrive at a valuation to a loss of future earning capacity using as the capital asset approach, as identified by the Court of Appeal in *Pallos v. Insurance Co. of British Columbia*, 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.) at para. 43:

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

the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income.

Discussion

[179] Applying the first branch of the three-step test to the evidence before me, I conclude that the evidence establishes a real and substantial possibility that the ongoing effects of the plaintiff's injuries will continue to limit the jobs that are open to him and render him less capable of full-time work. As noted above, both Dr. de Ciutiis and Dr. Medvedev are in agreement that the plaintiff's symptoms are unlikely to completely resolve. He needs to be cautious not to take on too much in order to manage his symptoms. This has led to the need for workplace accommodations, which makes him less attractive to potential employers.

[180] In respect of the second step, I find that there is a real and substantial possibility that his injuries will cause him income loss in the future. Given that his work qualifications and experience are almost exclusively in fields that demand physicality, there is a high likelihood that any work he does in the future will be of the type that has the potential to aggravate his symptoms. As such, he may have to take time away, work fewer hours, or seek work accommodations and may lose a job if these accommodations cannot be afforded.

[181] In terms of quantification, both parties have presented the court with past and future income calculations based on various likelihoods that the plaintiff would have remained employed at Seaspan. The plaintiff argues that but for his injuries, he would have remained with Seaspan until retirement at age 70 and would have been promoted to a chargehand position. Mr. Bowers on the other hand, points to the plaintiff's frequent job changes and choice to work in positions outside his certifications to argue that it is highly unlikely that he would have remained with Seaspan until he retired.

[182] From the date of the Accident to trial, I find that there is a real and substantial likelihood that absent the Accident, the plaintiff would have taken a job with Seaspan for at least two and a half years, from April 2022 until the date of trial. Mr. Timm, the

plaintiff's direct supervisor at Seaspan, testified that he was a quality fitter. This evidence was not challenged. This supports the likelihood that had he remained employed with Seaspan, the plaintiff could have risen to the position of a chargehand.

[183] Taking all of this into account, I find that there is a substantial likelihood that the plaintiff would have remained at Seaspan until at least June 2024.

[184] Going forward from trial, based on the plaintiff's work history, frequent job changes and his nascent plans to retrain before the Accident, I find that it is significantly less likely that he would have remained with Seaspan until age 65 and that there is no real and substantial possibility that he would have remained in this position until age 70. The plaintiff's admissions that Seaspan was a physically demanding work environment and that, even prior to the Accident, he was considering retraining so that he could find a less physically demanding job support this conclusion.

Past Income Loss Assessment

[185] The parties agreed that the plaintiff's reported earnings over the material period are as follows:

	T4 Income	EI Benefits	Other Employment Income	Other Income	Total Income
2014	$47,149	$0	$148	$11,101	$58,398
2015	$49,580	$0	$0	$0	$49,850
2016	$40,182	$7,777	$0	$0	$47,959
2017	$42,478	$0	$0	$0	$42,478
2018	$2,583	$7,560	$0	$0	$10,143
2019	$12,664	$0	$0	$0	$12,664
2020	$31,867	$0	$0	$6,000	$37,867
2021	$34,101	$0	$0	$0	$34,101
2022	$33,661	$9,305	$0	$0	$42,966
2023	$39,592	$0	$0	$0	$39,592

[186] The parties agreed that for 2024 just prior to the start of trial, the plaintiff earned $25,405.00.

[187] One difficulty with the evidence is that the rate of pay the plaintiff earned at Seaspan was not placed into evidence. Nor was the rate of a chargehand directly proven at trial although Mr. Timm provided evidence that it was 9% higher than that of a ship fitter.

[188] The parties each rely on calculations provided by an economist. The plaintiff tendered a report from Robert Wickson, while Mr. Bowers tendered a report from Judy Ren. The parties agree and I find that the appropriate value for the plaintiff's actual earned income from the time of the Accident to trial is $150,569.

[189] The economists differed in their calculation of the plaintiff's past income had the Accident not occurred. I prefer the calculation of Ms. Ren as Mr. Wickson did not subtract the plaintiff's actual earnings from the date of the Accident to trial from his past income loss calculation. Further, Mr. Wickson added 6.2% to account for non-wage benefits (beyond pension benefits) which I find is not justified. In the absence of evidence, I do not consider it reasonable to account for non-wage benefits, aside from pension benefits, that were not actually utilized by the plaintiff in the calculation of his past income loss. Such expenses are typically accounted for in special damages. I have no evidence of any specific losses relating to lost benefits.

[190] Ms. Ren calculates the plaintiff's income to the date of trial had he remained at Seaspan to be $374,365. This calculation was made with reference to the collective agreement that presumably set the plaintiff's wages. The collective agreement was not put into evidence although it was apparently in Ms. Ren's working file, and she was asked about her review of that document on cross-examination. However, I am satisfied that the amount of $233,796 represents a reasonable assessment of the plaintiff's past income loss.

Future Income Loss Assessment

[191] The plaintiff argues, and I agree, that his claim for future income loss falls into the “less clear-cut” category of cases in which a plaintiff’s injuries have led to continuing deficits, but their income at trial is similar to what it was at the time they were injured, as described in *Ploskon-Ciesla* at para. 11.

[192] I find that the following factors make this a less clear-cut case. First, the plaintiff’s current earnings are at or near his income in the years before the Accident. Secondly, his stream of income fluctuated in the years prior to the Accident. Finally, based on the evidence of Dr. Medvedev, I find that there is some possibility that the plaintiff will experience improvement in his symptoms which would increase his capacity to work. For all of these reasons, I find that employing a capital asset approach is the most appropriate method to assess his future income loss.

[193] Given the evidence and my findings as to probabilities at play, I find that due to the Accident, the plaintiff will suffer an annual loss of income capacity in the amount of $30,000 until the age of 65. In arriving at this value, I have taken into account the estimates of future with-Accident income and without-Accident income provided by the economists. I note, however, that the calculations provided by the economists do not assist me with determining the impact of the contingencies that the plaintiff’s symptoms will improve and that this improvement may allow him to retrain to obtain a millwright certification and ultimately secure higher paying work. The $30,000 annual loss includes a 15% deduction for these contingencies.

[194] Using the discount factors provided for in s. 56 of the *Law and Equity Act,* R.S.B.C. 1996, c. 253, I assess the present value of the total future income loss to age 65 as $283,000.

Cost of Future Care

[195] The objective of an award for cost of future care is to restore the injured party to the position that they would have occupied but for the injuries sustained as a result of the negligence of the other party. What is reasonably necessary to promote

the mental and physical health of the plaintiff is to be assessed on the basis of medical evidence: *Pang v. Nowakowski,* 2021 BCCA 478 at para. 56.

[196] Arriving at an award for future care cost necessarily involves an element of prediction and prophecy. Accordingly, it is an assessment rather than a precise accounting exercise although the court should determine the present value of future care cost: *Krangle (Guardian ad litem of) v. Brisco,* 2002 SCC 9 at para. 21.

[197] In *Pang* at para. 57*,* the Court of Appeal summarized the following additional principles:

> i) The court must be satisfied the plaintiff would, in fact, make use of the particular care item: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 40 and 54; *Hans v. Volvo Trucks North America Inc.*, 2018 BCCA 410 at paras. 86–87.
>
> ii) The court must be satisfied that the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred: *Shapiro v. Dailey*, 2012 BCCA 128 at paras. 54–55;
>
> iii) The court must be satisfied that there is no significant overlap in the various care items being sought: *Johal v. Meyede*, 2015 BCSC 1070 at para. 9(f); *Brodeur v. Provincial Health Services Authority*, 2016 BCSC 968 at para. 356; *Myers v. Gallo*, 2017 BCSC 2291 at para. 231.

[198] While a plaintiff's health and happiness are interrelated, amenities which make the plaintiff's life more bearable or enjoyable, but which are not an award of damages, are not recoverable as future care cost: *Warick v. Diwell*, 2018 BCCA 53 at para. 24.

[199] The plaintiff relies on the future care recommendations set out in the report of Mr. Smith while the defendant relies on the report of Ms. Branscombe.

[200] Although Ms. Branscombe's report was focused on a critique of Mr. Smith's report, she did agree that some of the future care items identified would promote the plaintiff's physical and mental well-being. In particular, she agreed that there was a medical basis for exercise therapy, vestibular therapy, nutrition services and counselling. The plaintiff provided evidence that he would try whatever was recommended to improve his symptoms. Accordingly, I find that he is motivated to

undertake an exercise program to improve his symptoms. While he indicated that he did not feel like he would utilize counselling, I infer that the plaintiff would be open to this treatment once it is made clear to him that Drs. de Ciutiis and Medvedev are of the opinion that it will improve his symptoms.

[201] Ms. Branscombe also agreed that the plaintiff would benefit from certain assistive tools in carrying out home and yard tasks. These include grab bars, a standing weeder, and a long-handled tree trimmer. There is medical evidence that these aids will assist in reducing the plaintiff's symptoms.

[202] Mr. Smith recommends some items, which I find overlap with other care items, are not medically justifiable or represent expenses that the plaintiff would incur in any event. This includes the ergonomic assessment, which, in my view, is unlikely to be necessary as the plaintiff is unlikely to work at a desk job. In any event, the management of symptoms that arise from the physical aspects of his employment can be addressed through exercise and vestibular therapy.

[203] The plaintiff has already undergone a vocational assessment in the course of this litigation. An additional assessment is not necessary. However, I believe that the plaintiff would benefit from vocational counselling should he choose to consider an alternate career that would be a better fit for his symptom management.

[204] I accept the opinion of Ms. Branscombe that passive therapies will do little to improve the plaintiff's functional performance.

[205] Mr. Smith recommended that the plaintiff utilize meditation as a strategy to manage his symptoms and recommends the purchase of a newer model smart phone and annual subscriptions to meditation apps. In my view, the smart phone expense is something that the plaintiff would otherwise incur and is not medically justifiable. As noted by Ms. Branscombe, meditation apps are not required to obtain the benefit of meditation.

[206] With respect to the downrigger for the plaintiff's boat, I cannot conclude on the basis of the evidence that this expense is medically justifiable.

[207] Given that the plaintiff and his wife rent their home, assistance with home repairs is an expense that he would be unlikely to incur in the absence of the Accident.

[208] In summary, I award the following amounts to the plaintiff which represents the present value of medically justified and reasonable future care cost:

Fitness pass:	$12,798.00
Kinesiology:	$839.00
Vocational Counselling:	$1,200.00
Counselling:	$4,000.00
Vestibular Therapy:	$7,000.00
Assistive Tools:	$400.00
Nutritional Services:	$2,000.00
Total:	$28,237.00

Summary

[209] In summary, the damages awarded to the plaintiff are as follows:

Non-pecuniary Damages:	$225,000.00
Past Loss of Income Earning Capacity:	$233,796.00
Future Loss of Income Earning Capacity:	$283,000.00
Cost of Future Care:	$28,237.00
Special Damages as Agreed	$8,837.20

Total:	$778,870.20

Costs

[210] As the plaintiff has been successful, he is presumptively entitled to his costs at Scale B. If either party wishes to submit otherwise, that party will advise the other within 30 days of these reasons, and set a date with the Supreme Court Scheduling as soon as reasonably practicable to hear the matter. Each side will provide written submissions to the other side and to the Court at least seven days before the hearing date.

"Hoffman J."