IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ranseth v. Doe,*
2024 BCSC 2281

Date: 20241216
Docket: M2011078
Registry: Vancouver

Between:

Jeremy Ranseth

Plaintiff

And

John Doe or Jane Doe and the Insurance Corporation of British Columbia as a Nominal Defendant

Defendants

Before: The Honourable Justice Giltrow

Reasons for Judgment

Counsel for the Plaintiff:	J.M. Green
Counsel for the Defendant, Insurance Corporation of British Columbia:	S. Horricks F. Mohamed
No other appearances	
Place and Dates of Trial:	Vancouver, B.C. May 27-31 and June 3-7, 2024
Place and Date of Judgment:	Vancouver, B.C. December 16, 2024

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Introduction

[1] The plaintiff, Jeremy Ranseth, claims damages for injuries suffered in a hit and run motor vehicle accident December 11, 2018 (the "MVA"). The defendant, the Insurance Corporation of British Columbia ("ICBC"), admitted liability for the MVA at trial.

[2] Mr. Ranseth is a 41-year old man who is experienced and capable with cars and machines, enjoys camping, driving his quad and truck on back roads, riding his motorcycle, working on and around his property, being with friends and loved ones, and walking his dogs. He has always lived on rural, and at times quite remote, properties. He currently lives on a 13-acre parcel of land, half of which is forested. Unfortunately, he is now, and has been for several years, severely limited in his ability to do many of the things he enjoys, including work. These limitations have arisen first from injuries following a serious workplace accident in November 2016 (the "WPI"), and subsequently from the MVA.

[3] The MVA is the direct subject of this case. However, when the MVA happened in 2018, Mr. Ranseth had not yet returned to work after the WPI. In determining what likely would have happened had the MVA not occurred, a particular challenge arises in this case because the Court is not to simply take a "snap shot" of where the plaintiff was in his health, recovery and employment as of the date of the MVA, but rather, to assess it as a point in time on a trajectory that was previously in motion as Mr. Ranseth sought to recover from, and begin to work again after, his WPI.

Issues

[4] The MVA was, as counsel for the defendant acknowledges, a "terrible accident", a hit and run, for which the defendant ICBC has admitted liability. The defendant also admits that Mr. Ranseth experiences myofascial mid to low back pain caused by the MVA. Further, the defendant concedes that Mr. Ranseth is functionally disabled, and that there is "no evidence that he can work in a meaningful way" in the future. However, the defendant argues that many of Mr. Ranseth's

functional limitations pre-existed the MVA, and stem largely from the WPI and, to a lesser extent, an unrelated pre-existing neck condition. Accordingly, the defendant argues, the MVA is not the cause of Mr. Ranseth's diminished capacity to earn income, and therefore no damages should be awarded in that regard. Similarly, the defendant argues that Mr. Ranseth's diminished ability to maintain his house and property pre-existed the MVA, and accordingly the Court should make a "sizeable deduction" to any award for compensation for housekeeping services.

[5] The heads of damage in issue are:

a) Quantification of non-pecuniary damages.

b) Diminished capacity to earn income (past and future).

c) Loss of housekeeping capacity.

d) Cost of future care.

[6] Special damages are agreed to be in the amount of $636.15.

[7] As noted, the defendant conceded at trial that Mr. Ranseth is vocationally disabled. Accordingly, there is no issue between the parties that Mr. Ranseth has future residual earning capacity that must be taken into account. There is a related issue of Mr. Ranseth's loss of housekeeping (including property maintenance) capacity. Mr. Ranseth concedes he can perform some housekeeping, albeit with pain, and accordingly claims only partial compensation for loss of housekeeping capacity, in addition to compensation for the cost of future professional assistance with housekeeping and property maintenance.

[8] The significant issue the Court must determine in relation to loss of earning capacity, as well as the related loss of housekeeping capacity, is whether, and to what extent, the MVA, rather than prior existing conditions, are the cause of those losses.

Background

Prior to the Accident

[9] Mr. Ranseth was born in Winnipeg, but has spent most of his life in British Columbia. He has been working since he was 15, and at 16 he moved for a period of time to Peru to work with his father in diamond drilling. He continued school by correspondence during this period, finishing high school when he was 19, and has continued working ever since, up to the time of the WPI when he was 34 years old.

[10] The WPI was a serious accident. On November 16, 2016, Mr. Ranseth was working under a car as a mechanic. The jack shifted, and the frame of the car fell on him, causing injuries to his head. He was taken to hospital where a CT scan of his head was taken. He was admitted to hospital overnight, released the next day. A week later, he attended for further assessment, and surgery was recommended to repair his facial injuries. He underwent that surgery November 24, 2016. For a period afterward, his jaw was wired shut.

[11] It is an agreed fact that Mr. Ranseth remained off work because of the WPI from November 16, 2016 up to the date of the MVA.

[12] Mr. Ranseth testified that other than a transient shoulder injury, the main injuries that he experienced from the WPI were facial pain and headaches. The defendant also points out, and the evidence shows, that Mr. Ranseth experienced double vision and dizziness in the period after the WPI.

[13] I will review here the evidence of Mr. Ranseth's injuries and recovery following the WPI up to the MVA.

[14] The period after the WPI was a very difficult one for Mr. Ranseth. While Mr. Ranseth had experienced occasional migraines before the WPI, about twice a year, after the WPI and the surgery, they were more frequent and intense**.** The frequency and severity varied, but they were at times debilitating. On Christmas Day 2016, about a month after surgery, he attended emergency due to a migraine.

[15] The plaintiff described 2017 as the lowest and most difficult point he suffered after the WPI.

[16] By January 2017, two months after the WPI, Mr. Ranseth was still suffering from a sore jaw, nose, cheekbones, left eye and left shoulder. His face was still bruised and swollen. He was still experiencing an increase in the intensity and frequency of migraines.

[17] The post-surgical wires in his mouth were taken out in February 2017. By March 2017, about 4 months after the WPI and surgery, he was still experiencing a sore face and sore shoulder. He was struggling to eat food such as sandwiches or pizza crust, but could eat soft foods. He reported to his family physician at that time that when he bent forward he felt blood rushing to his head and felt a sore face and headaches.

[18] In May 2017, Mr. Ranseth started to experience some impacts to his vision, in particular a reduction in peripheral vision and occasional blurry vision. When he was driving his truck, he would need to turn his head to see his sideview mirrors. He was also experiencing some limitations in his short-term memory.

[19] Also in May 2017, Mr. Ranseth was referred to Dr. Purkis through WorkSafe BC's ("WSBC") concussion program, for the purpose of determining whether he had sustained a mild traumatic brain injury ("mTBI"), which he had, and to determine what the most appropriate treatment for him might be. Dr. Purkis was called by the defendant to testify at trial.

[20] Dr. Purkis recommended that Mr. Ranseth commence a head injury treatment program called "Comprehensive Head Injury Evaluation" ("CHIE"), which Mr. Ranseth did, beginning in June 2017. Counsel for the defendant emphasizes in closing arguments that Mr. Ranseth did not complete the full 10 days usually intended for this program. However, based upon the testimony of Dr. Purkis, this does not mean Mr. Ranseth was not able to complete the treatment required. Rather, it was the clinicians' determination that Mr. Ranseth could obtain the

treatment closer to home. Dr. Purkis testified: “after 5 days of assessment we basically felt his treatment could be managed closer to home for him—he was having difficulty driving to our clinic in Surrey—this is common, the drive is often quite triggering for people—so we thought we could provide services he needed closer to home so he was discharged after 5 days.”

[21] I do not accept the defendant’s characterization that Mr. Ranseth was recovering so poorly from the WPI that he was unable to complete the head injury treatment program in June 2017. Rather, the assessment of Dr. Purkis and his colleagues was that Mr. Ranseth could complete the required treatment closer to his home, and he was discharged from the program for that reason.

[22] By October 2017, Mr. Ranseth’s family physician recommended that Mr. Ranseth begin an occupational rehabilitation program. This was 11 months after the WPI and 14 months prior to the MVA.

[23] In November 2017, Mr. Ranseth visited emergency for chest pains. On the evidence, this does not appear to have been a significant or enduring issue, and is not related to the claims before this Court.

[24] While Mr. Ranseth testified that about a year after the WPI, around November 2017, he could see a noticeable diminishment in the facial pain he was experiencing, he was nevertheless continuing to struggle with basic daily activitiestoward the end of 2017, including not being able to walk his dogs due to fatigue. Facial pain and headaches continued to limit his ability to do physical activity and labour in late 2017.

[25] By December 6, 2017, a year before the MVA, the defendant admits “Mr. Ranseth had improvement in his left shoulder range of motion and strength”. This was confirmed in cross-examination of the plaintiff with respect to Dr. Purkis’ clinical notes from March 2018: by then Mr. Ranseth was feeling marked improvement in his shoulder, and not feeling significantly limited by shoulder pain.

[26] As the defendant also acknowledges in closing argument, Mr. Ranseth reported that in December 2017, he was still experiencing migraines, but was able to relieve them with medication.

[27] During cross-examination of Mr. Ranseth, the defendant took him to a clinical record made by Dr. Purkis which suggested that by January 2018, Mr. Ranseth's work tolerance was up to 3 hours in a day. Mr. Ranseth agreed with that estimate. He had been discharged from the occupational rehabilitation program by that time.

[28] The evidence of the frequency of Mr. Ranseth's headaches or migraines thereafter in 2018 is this: Mr. Ranseth confirmed at trial that in March 2018, as he had reported to Dr. Purkis at the time, he continued to have severe upper dental pain while chewing, and had altered his diet to softer foods to avoid the pain. The pain from chewing could also trigger significant headaches. Mr. Ranseth reported to Dr. Purkis at that time that he was experiencing ongoing constant facial pain and "intermittent headaches which can be triggered with exposure to bright light or loud noise." Dr. Purkis noted that Mr. Ranseth could occasionally stop these headaches early with Tylenol, but if they developed into more severe migraine-type headaches he would also use morphine, Gravol and extra strength Tylenol. Mr. Ranseth confirmed this in testimony. He also confirmed that at that time, he was experiencing short-term memory difficulties, decreased energy, mild depression, and non-restorative sleep patterns.

[29] It was not clarified in evidence what "intermittent" meant in Dr. Purkis' note. But, by June 20, 2018, Mr. Ranseth reported to Dr. Purkis that he was experiencing more severe migraine type headaches approximately once a month. He was using morphine infrequently. If migraines did not resolve with morphine, he reported that he would go to hospital emergency, which in fact did occur June 22, 2018.

[30] Mr. Ranseth reported to a neuro-ophthalmologist on September 5, 2018, that at that time, he had not had a headache in two weeks.

[31] The defendant acknowledges in closing argument that in the fall of 2018, three months before the MVA, Mr. Ranseth had been able to make modifications to his lifestyle and daily living such that he reduced his headache frequency to one every few weeks.

[32] However, the winter months appear to have brought on an increase in migraine frequency in 2018. In direct examination, Mr. Ranseth testified that both pre- and post-MVA, cold weather would increase the pain he experienced—he would "feel it more." He described the impact of the metal in his face from the reconstructive surgery, "it's almost like metal gets a chill." On cross-examination, Mr. Ranseth agreed that in the month prior to the MVA, "there was a good chance" he was experiencing migraines at most three to four times in a week. This was in the winter, when his pain was increased from cold, and the pain triggered migraines for Mr. Ranseth. He agreed these migraines could last a few hours or a day.

[33] I do note that in closing argument the defendant acknowledges the role of cold weather in increasing Mr. Ranseth's pain and, correspondingly, his headaches. It is important in assessing what likely would have happened but for the MVA to recognize that the snap-shot of the month prior to the MVA is not representative of the broader reality Mr. Ranseth had been and was likely facing—his headache frequency in December was not the same as it had been six months earlier in June. It worsened with cold.

[34] I will briefly address Mr. Ranseth' history of neck related pain before the MVA. In 2012, Mr. Ranseth had undergone surgery on his neck. Prior to that, he suffered left shoulder pain and numbness in his left hand. The evidence was that this operation was "successful", and these symptoms had largely abated after that surgery. There was some evidence, based upon a 2020 Canada Pension Plan ("CPP") application Mr. Ranseth filled out retrospectively with the assistance of Dr. Wittington, whose evidence I will discuss below, that Mr. Ranseth's neck and shoulder were painful again in November 2016 after the WPI. However, in testimony Mr. Ranseth could not initially recall if he was experiencing any left arm pain in 2016.

He did agree on cross-examination that the statement he made in 2020 on his CPP application, that neck and arm pain were the main medical conditions preventing him from returning to work, was true as of November 2016. That was at the time of the WPI, two years before the MVA. The defendant admits that by December 6, 2017, a year before the MVA, “Mr. Ranseth had improvement in his left shoulder range of motion and strength”. There was no evidence that Mr. Ranseth was suffering any significant neck or arm pain or numbness in the period just prior to the MVA.

[35] Mr. Ranseth did suffer from short term memory difficulties and some impacts to mood after the WPI. He described some feelings of anxiety and depression at times. There was no evidence that these symptoms functionally limited Mr. Ranseth in his activities.

[36] For a period of time after the WPI but before the MVA, Mr. Ranseth had to rely on others to assist him with housecleaning and outdoor maintenance.

[37] Eventually these limitations relented such that Mr. Ranseth was able, at least on occasion, to do more. For example, in August 2018, Mr. Ranseth was able to work a full day assisting an electrician at a property in Whistler. This involved a 12-hour work day, not including the two-way commute between Abbotsford and Whistler that day, and included Mr. Ranseth repeatedly getting into and maneuvering around crawl spaces on neighbouring properties, which was the sort of bending down and moving that would previously have increased Mr. Ranseth’s facial pain.

[38] Mr. Ranseth’s previous facial pain was not a vocational barrier on that day. This was the occasion upon which he first met Dr. Wittington, who had commissioned the electrical work being done, and who described Mr. Ranseth as “a reasonably lively person” on that day. At one point during the day, after Dr. Wittington and Mr. Ranseth got to talking and he told her about his WPI, Mr. Ranseth showed her photos of his face after the WPI. She testified that she observed him more closely after that, having been surprised to learn the extent of the injuries he had suffered, and did not observe any sign that Mr. Ranseth was

hindered by headaches or dizziness. I will say more about Dr. Wittington below, as she came to take on a clinical role for Mr. Ranseth after that.

[39] Another example of the level of activity Mr. Ranseth was able to undertake at least once after the WPI, but before the MVA, arose from the fact that Mr. Ranseth's home in Lake Errok relied upon wood fire for heating. Mr. Ranseth testified that a few days before the MVA, he and two friends set out to the forest near his home, to cut and collect firewood for Mr. Ranseth's home. This involved chain sawing deadfall, bucking the pieces to rounds weighing approximately 40 pounds that could be loaded on Mr. Ranseth's truck and trailer, loading both the truck and the trailer, transporting the wood home, unloading, splitting the wood with Mr. Ranseth's hydraulic wood splitter and then stacking the wood to be ready for use. Mr. Ranseth was able to do all of this. He testified to feeling tired, but other than that "doing ok" and feeling "pleased" that he could do this, as he could not have done so right after the WPI.

[40] Meantime, Mr. Ranseth was engaged with WSBC regarding his prospects for returning to work. WSBC had determined, by March 2018, that Mr. Ranseth would not be able to return to work as a mechanic, due to the lasting effects of his workplace injuries. Mr. Ranseth had accepted this. WSBC was working with Mr. Ranseth to determine appropriate alternate employment. This included completing a vocational interest and aptitude assessment and a "Skills Analysis and Options Identification assessment".

[41] Around this time Mark Ponting, who had known Mr. Ranseth approximately 18 years, suggested to Mr. Ranseth he do something easier on his body than mechanical work. Mr. Ponting owns a crane company that delivers building supplies. He has owned the company for ten years, and drove a crane truck for 20 years before that. He met Mr. Ranseth while moving a container for him at a company in Abbotsford.

[42] Mr. Ponting suggested that Mr. Ranseth retrain to be able to do deliveries by crane truck. He explained “the crane does most of the lifting…it’s not like you are working your body really hard.”

[43] Mr. Ranseth testified that he was “excited” at this prospect, and he discussed with WSBC the possibility of him working as a semi-truck driver, and possibly further, to work as a driver and crane operator.

[44] Mr. Ranseth accompanied Mr. Ponting out on Mr. Ponting’s Kenworth and Peterbilt trucks about 12 times in 2018. Mr. Ponting testified that he did not observe Mr. Ranseth to be suffering from headaches or dizziness on any of those trips. Mr. Ponting also testified that he and Mr. Ranseth set up Mr. Ponting’s crane so that Mr. Ranseth could try operating it. Neither Mr. Ranseth nor Mr. Ponting testified to any limitations felt or observed as Mr. Ranseth operated the crane.

[45] On November 7, 2018, about a month before the MVA, a representative from WSBC told Mr. Ranseth that “the truck driving plan would be recommended for approval in the next couple of weeks.”

[46] The first step to the truck driving plan was for Mr. Ranseth to get a Class 1 driver’s licence. He had at that time only valid class 5 and 6 driver’s licences for his truck and motorcycle, both of which he continued to drive during this period, albeit with modifications to accommodate some of his workplace injuries. The defendant’s witness, Dr. Purkis, testified he had no concerns with Mr. Ranseth’s ability to drive throughout the time he saw Mr. Ranseth from May 2017 to June 2018.

[47] Mr. Ranseth also discussed with WSBC the prospect of him going beyond semi-truck driving, and additionally working as a crane operator. The evidence was that this discussion had not progressed by December 2018. There is no evidence this was because WSBC had determined Mr. Ranseth was incapable of competitive employment as a crane operator. Rather, it was because Mr. Ranseth had not, by that time, provided a letter of intent from a prospective employer for a crane operator position. Accordingly, WSBC notes state that the occupational target of crane

operator was not considered. I will say more about this below in addressing past and future earnings loss.

[48] On December 10, 2018, the day before the MVA, a WSBC representative contacted Mr. Ranseth to discuss the completion of the truck driving plan. She advised Mr. Ranseth that she would like Mr. Ranseth to go to the Motor Vehicle Branch ("MVB") and get the learners' Class 1 driver's book to study so that he could prepare for and then take the test. The closest MVB to Mr. Ranseth's home in Lake Errock was in Abbotsford, 45 minutes away. Mr. Ranseth went that same day to pick up the Class 1 driver's book.

[49] The next day, Mr. Ranseth suffered the MVA that is the subject of this case.

The Accident

[50] On December 11, 2018, Mr. Ranseth was struck while he was driving his truck to meet a friend for coffee in Abbotsford.

[51] The driver of the vehicle that struck Mr. Ranseth has never been identified, despite the efforts of both parties and the RCMP. Liability is admitted by the defendant insurer, and the details of the collision are undisputed.

[52] A truck ran a stop sign, striking the back of Mr. Ranseth's truck, sending it spinning off the road. Mr. Ranseth's truck struck an electrical pole with such force that the pole was partially displaced. His truck then landed in a ditch, partially submerged in water. The airbag deployed. Mr. Ranseth observed live wires and electrical sparks outside the truck. One of Mr. Ranseth's dogs had escaped out the back window, which had broken, and run off.

[53] Mr. Ranseth called 911 from inside his truck.

[54] Once BC Hydro shut down the power, Mr. Ranseth was assisted out of his truck by a fireman. He was advised to go to hospital by paramedics. However, he decided instead he would go home, and would go to hospital if anything changed.

[55] Friends of Mr. Ranseth's came to the accident scene after he called them. A fireman found Mr. Ranseth's dog. A friend drove Mr. Ranseth home.

[56] Mr. Ranseth's truck was deemed a total loss by ICBC.

After the Accident

Immediate Aftermath of the Accident

[57] Mr. Ranseth woke up the next day feeling very sore. His back was in significant pain and he struggled to get out of bed to let his dogs out.

[58] That same day, December 12, 2018, Mr. Ranseth called WSBC to report that he had been in a motor vehicle accident.

[59] That day or the next, Mr. Ranseth called his friend to drive him to a medical clinic.

Post-Accident Condition and Treatment

[60] At trial, Mr. Ranseth described his experiences of pain and limitation since the MVA. These have varied over time, and they have involved both his physical and mental health. He describes waking up the day after the MVA and struggling with low back pain while getting out of bed and getting to the door to let his dogs out. It is common ground that this low back pain was new, caused by the MVA. He also testified that his headaches "increased dramatically" "basically right away" after the MVA. This was the immediate pain he experienced. He further testified that a few months after the MVA his left hip began to be painful. He had had no hip problems before the MVA.

[61] Mr. Ranseth testified that after the MVA he was "back to not being able to do anything physically strenuous anymore" as he had been for a period after the WPI. He sold his quad because he was not riding it, did not go for walks with his dogs anymore except on "really good days" and he testified "even that was not very much in comparison to the average dog person. I was very limited."

[62] He testified that his low back pain eventually subsided somewhat after the MVA, but as of the time of trial he still cannot sit like before, and not for long periods. He lies down more than he ever used to, going for walks hurts, so he avoids it. When he walks his hip starts to get sore and he can feel the tension in his back elevate. He also cannot stand for long without discomfort and pain.

[63] Mr. Ranseth testified that he struggles with housecleaning and yard maintenance, and that two friends come over to help with that now. These friends, Justin King and Natalie Wylie, testified at trial. He can not putter and work on vehicles like he used to, nor go on long drives like he used to. He used to like exploring up logging roads. Now he experiences discomfort in his back going up uneven roads. He upgraded the seats in his truck so he could drive more, but he is still limited in how much he can do so. He needs to be able to lay back when he drives. He has modified his motorcycle for comfort, and says he can go short distances. However, the defendant points out that less than two weeks after the MVA, Mr. Ranseth was able to take a three-hour motorcycle ride on Christmas Day to Squamish. That said, the defendant does not assert that Mr. Ranseth is able to drive vocationally as of trial, nor that he will be in the future.

[64] Dr. Wittington, a general practioner, saw Mr. Ranseth clinically a few days after the MVA. She testified that he was “very unsteady, wasn’t moving well” and appeared to be having difficulty from his “back or hips.” She also testified that Mr. Ranseth started complaining to her of more severe headaches after the MVA, including at least once of a migraine that lasted for 3 days that he could not get rid of. He was vomiting, unable to get off the couch. He would text her to ask her what he could do. Her clinical observations were consistent with these complaints. Dr. Wittington said in testimony that after the MVA, Mr. Ranseth “[w]asn’t anywhere near the reasonably lively person I had met. I would run in to him around town. He was not doing as well. He started to lose weight.” She went on in testimony to say after the MVA, Mr. Ranseth became a “[m]uch more ill person; he really became quite debilitated, and I actually became extremely concerned, he clearly had a large increase in his pain level and muscle spasms, difficulty moving, I could actually see

him getting on and off the motorbike and he was having difficulty, and I found it extremely distressing because he could not always come in."

[65] This was consistent with what Mr. Ranseth's friend, Justin King observed and described in testimony. Mr. King has known Mr. Ranseth since late 2019, having met him about a year after the MVA. They met when Mr. King bought truck rims off Mr. Ranseth. Mr. King then helped Mr. Ranseth move and helped him clear the property he was moving to in Langley, as the previous tenants had left it in poor shape. This is the 13-acre property on which Mr. Ranseth currently lives. When Mr. Ranseth moved in, Mr. King describes not being able to see the back yard, trees hidden in blackberry bushes, a lot of garbage left behind. They worked together to improve the property; however, Mr. King observed Mr. Ranseth to be significantly limited in what he could do. He observed Mr. Ranseth "stumbling around" and that it appeared "his hip was bugging him really bad."

[66] Since late 2019 to the time of trial, Mr. King went to Mr. Ranseth's property almost weekly to help him with maintenance of the property. Mr. King observed Mr. Ranseth had good days and bad days; some days he would try to work on the property for five to ten minutes and then be unable to do anything for the rest of the day. Mr. King observed, and heard Mr. Ranseth say, that Mr. Ranseth's hip would "start locking up on him", and observed he was slow to walk around and had a limp. Mr. Ranseth would try to help Mr. King move things around if he could. For instance, he would bring the chainsaw over, put in the gas. But Mr. King would have to do the chainsawing because Mr. Ranseth could not lift it without pain. This is in contrast to the full day of chainsawing and loading firewood Mr. Ranseth was able to do just before the MVA.

[67] Mr. King went on to describe the tasks he assisted Mr. Ranseth with at the property, including mowing with the ride-on lawn mower, clearing deadfall, using the log splitter, although he noted Mr. Ranseth is able to handle the latter with small pieces of wood. Mr. King described that he would pile firewood and Mr. Ranseth could then tarp it. He said Mr. Ranseth "has a hard time bending over with his back,

his hip locks up; he's bent over and he's stuck in a position for five to ten minutes before he can get out of it. He appears shaky when it happens." Mr. King has tried to help Mr. Ranseth a couple of times when this happens, but observed Mr. Ranseth "doesn't want too much help." Mr. King also observed that in wintertime, Mr. Ranseth will more often use a cane to walk, and that he goes out less in wintertime. Mr. King observed that when Mr. Ranseth is using the cane, he is "grumpier", "doesn't like to talk a lot…short answers…sometimes he is just out for a minute then back the rest of the day." Mr. King testified that from Mr. Ranseth's facial expression, Mr. King "can tell he's in pain, frustrated."

[68] The defendant points out that Mr. King's observations about Mr. Ranseth's hip pain are at odds with what Mr. Ranseth told the plaintiff's physical medicine expert Dr. Chow, whom he saw October 19, 2023. Mr. Ranseth told Dr. Chow that the pain in his hip is not bothering him and not limiting him. However, Mr. Ranseth did tell Dr. Chow he intermittently experiences left hip and buttock pain rated 3-6/10 on a pain scale, and the pain is usually 3 and it is a dull ache. Mr. Ranseth was not asked in cross-examination about this clinical note by Dr. Chow. Without more, I do not find this statement to be inconsistent with the observations of Mr. King or Mr. Ranseth's testimony about his hip. There is no dispute on the evidence that the "locked up" hip events are more intermittent than the more constant hip pain he experiences. It also appears that these events, not the more constant pain, are the hip-related events that starkly limit Mr. Ranseth's movement temporarily.

[69] At trial Mr. Ranseth testified that he continues to have both back and hip pain, that they are the dominant pain he feels, and that he needs to keep those sources of pain down to keep migraines at bay.

[70] Mr. Ranseth testified that, as of trial, a "good day" for his back pain allows him to take the dogs into the field out back and go for a walk for half an hour. A bad day means he can barely let the dogs out the door. He had had at least one such bad day in the two weeks preceding trial.

[71] Mr. Ranseth testified that pain is a big trigger for headaches, and that after the MVA, they were occurring about four to five times a week, but he was eventually able to "ease things off." I note that the defendant says that by mid-2019, the MVA-related aggravation of Mr. Ranseth's headaches had subsided.

[72] Mr. Ranseth testified that he has learned to adapt to minimize pain by slowing down, being more methodical in his movements, developing processes for his activities of daily living. However, he cannot avoid pain when doing many activities, including standing doing dishes at the sink, sweeping, mopping, and wiping down baseboards. Leaning over, including over the sink to do dishes, is a quick trigger for back pain.

[73] Mr. Ranseth's friend Nathalie Wiley, who testified, drives down from Kamloops once a month to help him with basic house cleaning, as he cannot do so without back pain. Mr. Ranseth testified that Ms. Wiley does not have time to do a deep clean, but it helps with the "chaos" that builds up between her visits. Mr. Ranseth testified that with the dog hair, his house can look "like a tornado" without Ms. Wiley's help.

[74] Mr. Ranseth testified that he feels embarrassed by the state of his home. He does not invite people over anymore, as he does not want them to see the "shambles I live in."

[75] Mr. Ranseth testified that while he had been relying on his fiancée for help cleaning the house for a period after the WPI, by the time preceding the MVA, he was back to being able to clean his house himself.

[76] Dr. Wittington testified that, seeing Mr. Ranseth from the end of 2018 through to the date of trial, she observed:

> I think it's got progressively worse. He's much more hunched over, he's nowhere near as strong as he was, he doesn't move as well and he's had muscle wasting and he doesn't seem to be able to do the things he did before…weed eaters and mowing. … I know he's having trouble riding the vehicles to do the work.

[77] Dr. Wittington went on to describe Mr. Ranseth's emotional affect that she has observed:

> Very concerning. He was a reasonably positive man despite having a car fall on his face and nearly killing him. He was looking forward to rehabilitation and getting on with his life. He certainly doesn't have the same consideration that he is going to get better…

[78] In February 2019, 3 months after the MVA, Nima Nassouti, an occupational therapist, traveled to Mr. Ranseth's home at Lake Errock to assess him in order to produce a report for ICBC. Mr. Nassouti testified that he observed Mr. Ranseth to be dealing with pain and discomfort in his lower back, with a limited range of motion and difficulty completing tasks around the home. He did not recall observing other physical symptoms in Mr. Ranseth during the assessment. Nor did he observe any dizziness on Mr. Ranseth's part.

[79] Mr. Nassouti recommended equipment and treatments. For treatment, he recommended physiotherapy, massage therapy and eventually a transition to active rehabilitation. The equipment he recommended was to assist with tasks like bath transfers and increased sitting tolerance and support for Mr. Ranseth's lower back. Mr. Nassouti testified that the equipment was installed and Mr. Ranseth was taught how to use it.

[80] Another occupational therapist, Nazly Abtahi, saw Mr. Ranseth in his home in Langley in late November 2023. She observed the state of Mr. Ranseth's home—she saw boxes everywhere, debris on the floor, dirty dishes everywhere, stains in the bathroom and kitchen. She described Mr. Ranseth's movements as guarded, moving with a rigid posture. She observed that when Mr. Ranseth would stand up he would rely on surfaces to push himself up, and that he would grimace after completing a sit to stand transfer. She also observed his transfers would take longer as the assessment progressed and that he was not able to stand for more than a few minutes at time. Ms. Abtahi did not think it reasonable to test Mr. Ranseth's ability to lift or carry things because his range of motion was so evidently limited. She determined it would not be appropriate to ask him to bend and carry things. She

determined Mr. Ranseth requires housework support in light of these limitations. She saw no inconsistencies in his pain reporting and expression that day—nothing that would indicate Mr. Ranseth was exaggerating the pain he was experiencing.

[81] I will note that throughout the clinical and expert medical evidence given in this trial, the further relevant portions of which I will describe later in these reasons, no witness was of the view that Mr. Ranseth was exaggerating or fabricating his expressions or experiences of pain.

Credibility and Reliability of Evidence

[82] The plaintiff's credibility and reliability are of fundamental importance in a personal injury case. Accordingly, I will say a few words at the outset regarding Mr. Ranseth's credibility and reliability. I will address credibility and reliability of other fact and expert witnesses as relevant in my reasons below.

[83] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013) as follows:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.),* [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

[84] Credibility and reliability are not the same thing. Reliability analysis "is concerned with the accuracy of a witness's testimony; it involves consideration of a witness's ability to accurately observe, recall, and recount the events in issue": *Ford*

v. Lin, 2022 BCCA 179 at para. 104; see also *R. v. Khan*, 2015 BCCA 320 at para. 44, leave to appeal to SCC ref'd, 36623 (17 March 2016).

[85] If the plaintiff's account of his or her change in physical, mental, and or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinions rest will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 49–50.

[86] I found Mr. Ranseth to be a credible witness. His demeanor was stoic during testimony, his answers concise, with no apparent tendency toward overstatement. He testified that he was experiencing pain during testimony, and his discomfort sitting and transitioning to standing appeared to increase over the course of testimony. He did not attest to experiencing headaches during testimony. He was forthright in cross-examination, and his evidence was largely internally and externally consistent. The symptoms and pain reported by Mr. Ranseth accord with the evidence of all of the testifying physicians in this case, both fact and expert witnesses, including the defendant's expert Dr. Perera, whose opinion was somewhat of an outlier among the experts.

[87] Mr. Ranseth's reliability as a witness was somewhat less than his solid credibility. This was particularly so with respect to recalling past pain events, especially the frequency of headaches and migraines he experienced before the MVA. For example, in direct testimony he recalled that in the months just prior to the MVA, he was experiencing migraines approximately "one every couple of weeks maybe". However, upon cross-examination, he agreed that in the month prior to the MVA, after the weather turned cold and his facial pain increased, there was a good chance he was experiencing headaches or migraines up to three or four times a week. However, I do not find that this impugns Mr. Ranseth's credibility—he did not resist the proposition or hesitate to agree with it on cross-examination. Rather, it appears to be related more to Mr. Ranseth's honest difficulty in recalling specific experiences of pain over several years.

[88] In my view, this is not surprising, on the evidence. Mr. Ranseth had worked to recover from the 2016 injury, had learned to adapt how and what he ate to avoid or minimize facial pain, and had learned to identify and manage triggers for headaches and migraines. He was provided no guidebook for this pain and trigger management; it was through trial and error, advances and set backs, and significant lifestyle adaptation that he made non-linear progress. The non-linear nature of the progress is demonstrated, for example, by his reports to medical practitioners of migraine frequency in the months preceding the MVA. The defendant points to the clinical record of neurologist Dr. Iqbal, who Mr. Ranseth saw in October 2018, to demonstrate that at that time, Mr. Ranseth reported a headache severity of nine out of ten. However, that same record indicates that Mr. Ranseth reported that at that time, he was experiencing headaches "almost every few weeks." Accordingly, on the whole of the evidence, including the previously mentioned clinical record of Dr. Purkis and Mr. Ranseth's testimony, it appears Mr. Ranseth went for a several month period of experiencing headaches only every few weeks or once a month before the frequency increased in wintertime, with the increase in his facial pain resulting from the cold weather.

[89] While I do not find that the change in Mr. Ranseth's testimony between direct and cross-examination with respect to the frequency of his headaches in the period prior to the MVA impugns his credibility (truthfulness), I do find that Mr. Ranseth was experiencing migraines and headaches around December 2018 more frequently than he initially attested. However, I find that this increase in frequency resulted from the increase in his facial pain resulting from the cold weather. As I will describe below, I also find that Mr. Ranseth's facial pain did go on, after the MVA, to partially resolve with treatment. I further find that the predominant pain Mr. Ranseth experiences as of the date of trial is back and hip pain, with his previous facial pain having diminished substantially.

[90] I address below the relevance of these facts to the legal analysis.

Causation

Parties' Positions

[91] Mr. Ranseth has not returned to work since the MVA. He takes the position that he is unable to work in light of the injuries he suffered in the MVA, and that he has no prospect of returning to work in the future.

[92] Counsel for the plaintiff argues: "of all his injuries—from either the workplace injury or car crash—only the plaintiff's back and hip injuries are functionally disabling for him through to today." The plaintiff says they are functionally disabling at work, at home and in the community.

[93] In closing argument, counsel for the defendant concedes that there was no evidence that Mr. Ranseth "can work in a meaningful way", and states that the defendant is "not taking a strong position" that Mr. Ranseth should go back to work.

[94] The defendant also admitted at trial that Mr. Ranseth experiences myofascial mid to low back pain caused by the MVA.

[95] The defendant argues, however, that many of Mr. Ranseth's functional limitations pre-existed the MVA and "stem largely from the Workplace Incident and, to a lesser extent, an unrelated neck condition."

[96] Mr. Ranseth, by contrast, says that some of his injuries (back and hip pain) arose only upon the MVA and others were aggravated (headaches, psychiatric and cognitive symptoms) by the MVA and that, in either case, the defendant is liable for the injury. Further, it is his back and hip pain that prevent him from working, not the lingering impacts of any previous injury.

[97] The defendant's primary position is that Mr. Ranseth has not suffered a vocational disability because of the MVA or his back pain. Rather, the defendant says, Mr. Ranseth was already vocationally disabled when the MVA occurred, and, accordingly, the defendant is not responsible for any loss or damage suffered by Mr. Ranseth.

[98] The defendant's alternative position is that if Mr. Ranseth is found to be vocationally disabled and that was caused by the MVA, his future earning losses should be evaluated on a capital asset model based upon his work as a mechanic, which is what he did prior to the WPI, rather than as a truck driver or crane operator, which were only prospective vocations that he never performed. The defendant's primary position is to be assessed as a question of causation. The alternative position will be assessed as a question of damages assessment.

[99] The task for the Court at this stage of the analysis, on causation, is to determine:

a) Injury: Is the MVA the cause of the injuries and symptoms Mr. Ranseth suffers?

b) Loss: Do the injuries and symptoms caused by the MVA impair Mr. Ranseth's capacity to work, maintain his home and enjoy life?

The Law

[100] Except in the special circumstances discussed below, the plaintiff must establish on a balance of probabilities that the defendant's negligence caused an injury. The defendant's negligence does not have to be the sole cause of the injury so long as it is a necessary cause: *Emil Anderson Maintenance Co. Ltd. v. Taylor*, 2024 BCCA 156 at para. 130. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 13–17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[101] The primary test for causation asks: but for the defendant's negligence, would the plaintiff have suffered the injury? The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between

the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21–23; *Zenone v. Knight*, 2024 BCCA 200 at para. 55.

[102] As Justice Kent recently summarized in *Moen v. Grantham*, 2024 BCSC 937 at para. 191, quoting his previous judgment in *Kalstrom v. Yip*, 2016 BCSC 829 at para. 318:

> [318] The basic legal principles respecting causation are found in the seminal case of *Athey v. Leonati*, [1996] 3 S.C.R. 458, repeated many times since, and which include:
>
> 1. the general, but not necessarily conclusive test for causation is the "but for" test requiring the plaintiff show his injury and loss would not have occurred but for the negligence of the defendant;
> 2. this causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense;
> 3. it is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long as it is part of the cause of an injury, the defendant is liable; and
> 4. apportionment does not lie between tortious causes and non-tortious causes of the injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he is not responsible also helped to produce the harm.
>
> [Justice Major's emphasis.]
>
> [319] The above paradigm addresses principles of liability. It does not address principles related to the assessment of damages in tort. The latter requires consideration of conditions or events unrelated to the tort(s) which occurred either before or after the plaintiff's injury and which impact the nature or extent of the compensation that should be awarded for the tort. In such situations, *Athey* reminds us to consider first principles:
>
> > [32] ... The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence ("the original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position" which is the plaintiff's loss. ...
> >
> > [Justice Major's emphasis.]

[103] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58:

> 78 … Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey.*

[104] Accordingly, the most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been if not for the defendant's negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person (the "thin skull" rule). A defendant is fully liable for the unexpectedly severe injuries of the thin skull plaintiff because liability cannot be apportioned between causes: *Dornan v. Silva*, 2021 BCCA 228 at para. 41. However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (the "crumbling skull" rule): *Athey* at paras. 32–35.

Psychological Injury

[105] While in this case the plaintiff emphasizes that it is the physical back pain he experiences that is the dominant source of the injury and loss he experiences, the evidence demonstrates that Mr. Ranseth is experiencing cognitive and psychological difficulties as well, which he says are caused by the MVA.

[106] The concept of "reasonable foreseeability" is subject to a qualification when the injury is psychiatric in nature. As Justice Bennett stated in *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258:

> [74] … where the psychiatric injury is consequential to the physical injury for which the defendant is responsible, the defendant is also responsible for the psychiatric injury even if this injury was unforeseeable.

Discussion

Back Pain

[107] As noted, the defendant admits that Mr. Ranseth experiences myofascial mid to low back pain caused by the MVA. This accords with the evidence. There is no evidence, nor any assertion by the defendant, that Mr. Ranseth suffered back pain prior to the MVA or would have experienced it but for the MVA.

[108] The evidence is that the back pain Mr. Ranseth experiences is significant and ongoing. Furthermore, the predominant injury and limitation experienced by the plaintiff as of the trial date relates to his lower back pain. The plaintiff's evidence was that the pain in his back arises when he sits, stands or walks for too long. None of these are limitations he had before the MVA. His evidence about these limitations was not shaken or challenged on cross-examination. Further, it is consistent with the clinical records of all physicians and the evidence of the expert witnesses who testified in this case, even Dr. Perera, whose evidence I will address later in these reasons.

[109] All of the medical evidence at trial, both expert and clinical, supported the conclusion that Mr. Ranseth suffered soft tissue and musculoskeletal injuries in his lower back in the MVA.

[110] Dr. Chow, who was qualified as an expert in physical medicine, with a speciality in chronic pain and spinal conditions in particular, stated in his report:

> His functional limitation as a result of the MVA, from a physical perspective, is in regard to the thoraco-lumbo-sacral spine where he has impairment he lacks the spinal agility, mobility, reaction time and tolerance. The injured area of the thoraco-lumbo-sacral spine would not be able to tolerate excessive loads which would be created by activities that are prolonged and strenuous such as prolonged sitting, standing, walking, bending, twisting, driving, carrying, lifting, pulling and pushing. This would explain why he has pain with some of the personal care and doing all the housekeeping tasks.
>
> [Emphasis added.]

[111] Dr. Chow observed Mr. Ranseth had decreased range of motion with trigger points and pain in all ranges of motion.

[112] With respect to personal care, Dr. Chow noted in his report that Mr. Ranseth "[h]as back pain bathing, showering, cutting toenails, walking and stair climbing and changing clothes." This accords with the plaintiff's evidence and the evidence of the two occupational therapists who assessed Mr. Ranseth and testified at trial.

[113] Dr. Cameron**,** who was called by the plaintiff and qualified to testify as an expert in neurology with particular expertise in musculoskeletal conditions, observed that Mr. Ranseth had a severe spasm of his right thoracic lumbar paraspinal muscles—in testimony showing a fist to illustrate the nature of the spasm. He observed that Mr. Ranseth had decreased range of motion and movement due to the back pain.

[114] Dr. Medvedev, a witness for the defendant qualified as an expert in general neurology with experience in mild traumatic brain injury and treatment, assessed Mr. Ranseth and diagnosed muscle and soft tissue injuries and myofascial pain due to strain and sprain at the lower back.

[115] There is no suggestion from any of the doctors who assessed Mr. Ranseth, whether for the defendant or the plaintiff, that Mr. Ranseth was exaggerating or fabricating any of the pain symptoms he was exhibiting. This was consistent with my assessment of Mr. Ranseth's credibility in testimony.

[116] Dr. Chow, who was a measured and credible witness, conducted specific tests to determine whether Mr. Ranseth was fabricating or exaggerating this pain, or whether he was a particularly pain-sensitive person. Dr. Chow testified that these tests demonstrated that, even when distracted, Mr. Ranseth's pain was evident, and that he was not an especially pain-sensitive person. Dr. Chow concluded Mr. Ranseth's "functional limitation is from his back pain and is significant in all activities."'

[117] Furthermore, all expert witnesses opined that the current degree of impairment that Mr. Ranseth suffers is not expected to improve. While there may be some prospect of abatement of symptoms temporarily with some treatments, all

experts were of the view that Mr. Ranseth's recovery has plateaued, and it is expected that his current degree of impairment will be long term. I do note that Dr. Medvedev was somewhat less clear on this point, but only to the extent that his expectation that Mr. Ranseth's complaints of pain will continue appeared to relate, in his view, to both pre-MVA and post-MVA pain.

[118] Accordingly, I find that Mr. Ranseth suffered soft tissue and musculoskeletal injuries to his lumbar region as a result of the MVA, and continues to suffer myofascial pain syndrome as a result. I find that the pain he experiences is significant and significantly debilitating given the extensive range of activities that trigger this pain. I find these injuries and this pain and the functional limitations deriving from both are the direct cause of the subject MVA. Moreover, while I will go on to discuss other symptoms Mr. Ranseth suffers, I find that the back pain Mr. Ranseth suffers is the predominant and prevailing source of his functional limitations.

Hip Pain

[119] Mr. Ranseth also testified that his left hip causes him pain. This is a symptom that he did not experience before the MVA. It arose a few months after the MVA. Mr. Ranseth described his hip "locking up" on occasion. He testified that he will at times walk with a cane due to pain in his hip, or as a precaution so that he does not fall over if his hip locks up.

[120] This is consistent with the observations of Mr. Ranseth's friend Justin King as noted above, who accompanies him and assists him in doing manual chores around his house and property. It is also consistent with the evidence of Dr. Wittington, who has assessed Mr. Ranseth clinically and sees him occasionally out in the community, thereby with an opportunity to observe him spontaneously.

[121] Dr. Wittington testified that clinically, she has observed that Mr. Ranseth's left hip has an anterior rotation. She also testified that Mr. Ranseth "has complained about his hip dislocating and being unable to move."

[122] There is no evidence or suggestion that this hip pain preceded the MVA. The defendant does not appear to resist the submission that Mr. Ranseth's hip pain is caused by the MVA; rather, the defendant points to Dr. Chow's clinical note which states that Mr. Ranseth reported to him in October 2023 that his hip pain does not limit his function. However, as I have said, Mr. Ranseth was not asked about this on cross-examination. The preponderance of the evidence, including Mr. Ranseth's clear and credible testimony at trial, is that he is functionally limited by his hip pain. His hip "locks up" on him, and at times renders him so unstable that he walks with a cane.

[123] There is also a commonality in restrictions arising from Mr. Ranseth's hip and back pain: limitations on Mr. Ranseth's ability to walk, lift and bend. These are all restrictions that he experiences from the back pain as well as from hip pain. There is no suggestion by the defendant that this hip pain arises from any cause other than the MVA and the musculoskeletal injuries he incurred in that accident, nor that it would have been present without the MVA. The hip pain is intermittent, more so than the back pain.

[124] On the whole of the evidence, and on a balance of probabilities, I find that in addition to his back pain, Mr. Ranseth's hip pain was caused by the MVA, and that it contributes to the functional limitations he experiences.

Neck

[125] Mr. Ranseth did not attest to neck pain as a current complaint as of the time of trial, and he does not say that he is limited by neck pain. For its part, the defendant emphasized Mr. Ranseth's 2012 neck surgery and his intermittent reports of neck pain since the MVA shown in the clinical records.

[126] There is evidence that Mr. Ranseth has reported suffering neck pain since the MVA. Dr. Cameron concluded in his report that as a result of the MVA, Mr. Ranseth suffered soft tissue and musculoskeletal injuries to the neck, shoulder and back. However, in his examination of Mr. Ranseth, Dr. Cameron noted that the location of

the prior surgical fusion (neck surgery) was not implicated in the neck pain experienced by Mr. Ranseth post-MVA.

[127] Dr. Perera, the defendant's physical medicine expert, noted in his Independent Medical Examination report that on September 28, 2023, Mr. Ranseth reported neck pain and stiffness along the neck and upper back. Dr. Perera opined that Mr. Ranseth's reports of neck pain likely relate to degenerative disk disease, and that Mr. Ranseth's neck pain will continue into the future.

[128] However, as noted, Mr. Ranseth did not at trial testify to any significant ongoing neck pain, either in direct or cross-examination. In February 2020, Dr. Wittington and Mr. Ranseth completed an application for Canada Pension Plan Disability Benefits that was retrospective to November 2016. In cross-examination regarding this application, Mr. Ranseth confirmed that in November 2016, after the WPI, he was prevented from working because of pain in his neck, arms and hands, but did not testify that this pain was ongoing, much less that it prevents him from working today.

[129] The defendant argues that Mr. Ranseth's neck pain should result in a significant reduction in any damage award for loss of future earning capacity, as a negative contingency, based on Dr. Perera's opinion that the neck pain will continue into the future.

[130] The problem with this submission is that the neck pain Dr. Perera says will continue into the future was not established on the evidence to be significant or functionally limiting pain. Mr. Ranseth does not attest to neck pain being a significant ongoing issue, much less one that contributes to his inability to work in the future. Nor is there any evidence that neck pain is a cause of any diminished ability to work or maintain his house and property. Not even Dr. Perera opines that neck pain is the cause of Mr. Ranseth's vocational disability. Nor does Dr. Perera, or any expert, opine that Mr. Ranseth's neck pain will worsen into the future.

[131] Accordingly, the level of neck pain or discomfort that Mr. Ranseth is experiencing is not the cause of the loss for which Mr. Ranseth claims compensation in this action. Nor is there evidence upon which to find there is a real and substantial possibility that neck pain would have or will become vocationally disabling for Mr. Ranseth in the future.

[132] Therefore, as I will discuss later in these reasons, I do not find that Mr. Ranseth's neck pain provides the basis upon which to apply a negative contingency to damages for future losses.

Migraines

[133] It is undisputed that Mr. Ranseth suffered headaches, including migraines, before the MVA as a result of the WPI, and that he has and continues to suffer them post-MVA. There also appears to be no dispute that the MVA, and the pain caused by it, exacerbated Mr. Ranseth's headaches for a period of time.

[134] The defendant submits that this MVA-related headache aggravation subsided by mid-2019. The plaintiff submits that to the extent Mr. Ranseth suffered headaches before the MVA and suffers headaches as of the date of trial, there is no evidence that the headaches have ever been a barrier to his return to work.

[135] Two points are in dispute:

a) Would Mr. Ranseth be suffering headaches and migraines to the degree he has since December 2018 had the MVA not happened?

b) Do headaches and migraines contribute to his inability to work now?

[136] Some confusion results from the common use of the term "headache" throughout the clinical records and expert reports in this case. At times, the term "headache" is used to describe tension headaches and migraines, both of which Mr. Ranseth experiences. Tension headaches are not debilitating for Mr. Ranseth. Migraines can be. Furthermore, if Mr. Ranseth cannot abate the pain from a tension headache, he finds it may develop into a migraine.

[137] What is apparent on the evidence is that pain is an important trigger for Mr. Ranseth's headaches. This was so before the MVA. It remained so after the MVA.

[138] After the MVA, Mr. Ranseth experienced new, or additional, pain triggers for headaches. In this sense, the MVA aggravated Mr. Ranseth's headache symptoms.

[139] Prior to the MVA, Mr. Ranseth was learning and adapting to managing life so as to avoid headaches or respond to them promptly so they would not get worse and become migraines. That said, the headaches and migraines had not resolved by the time of the MVA.

[140] As I have explained earlier in these reasons, while I find Mr. Ranseth to be a credible witness, I found his testimony with respect to the frequency of headaches prior to the MVA to be somewhat unreliable. It appeared Mr. Ranseth had trouble recalling how frequently he was experiencing headaches during specific periods that preceded the MVA. However, as I have said, I did not find this to negatively impact Mr. Ranseth's credibility, as he readily agreed that he had made statements recorded in clinical records and that they were true at the time. The issue, rather, appears to be that Mr. Ranseth had difficulty recalling at trial specific pain experiences that occurred over six years before his testimony. This is not surprising given that headaches and migraines were frequently recurring events for him.

[141] Furthermore, Mr. Ranseth testified that he was learning to identify the triggers for headaches and migraines and how to adapt his life to avoid triggers, but it was trial and error, not strictly a linear progression toward fewer incidents despite the overall trend. For example, as I have set out above, the evidence is that in June and October 2018, Mr. Ranseth reported experiencing headaches or migraines once a month or every few weeks, but when winter brought cold weather, his facial pain increased and by November, he was experiencing them up to several times a week again.

[142] On the whole of the evidence, I conclude that the frequency and intensity of Mr. Ranseth's headaches increased for a period after the MVA, but by the time of trial had returned to a level approximately similar to what they were prior to the MVA. However, this is only a partial answer to the questions before the Court. Both before the MVA and after the MVA Mr. Ranseth had to learn what triggers to avoid to prevent and abate his headaches to bring them down to the lowest frequency and severity possible. Pain is a major trigger for Mr. Ranseth's headaches. Mr. Ranseth experiences a range of pain since the MVA that he did not experience before the MVA—in particular, the significant pain and limitations introduced by his lower back injury. The activities he must now avoid, after the MVA, are more extensive than those he had to avoid before the MVA.

[143] For example, in the few months before the MVA, two years after the WPI, Mr. Ranseth was, without debilitating pain, able to work a 12-hour day which included bending down and moving around in crawl spaces as well as sitting through a commute of at least two hours each way between Abbotsford and Whistler. He was also able to spend a full day walking through the woods, chainsawing fallen trees, bucking them up, loading them into his truck and trailer, splitting the wood and storing it for firewood. These are not activities he can do today after the injuries he sustained in the MVA. These are activities he now must avoid to avoid back and potential hip pain, which in turn is pain likely to trigger headaches. In fact, Mr. Ranseth must, today, avoid activities far less strenuous than the two examples above to avoid pain. For example, walking his dogs and cutting his toenails can trigger his back pain now. Accordingly, I do not find that Mr. Ranseth would have suffered the same level of functional disability from headaches that he experiences today, but for the MVA.

[144] Furthermore, there is evidence to support a finding that there is a real and substantial possibility that but for the MVA, Mr. Ranseth's headaches would have begun to diminish in frequency, if not also intensity.

[145] Importantly, after the WPI, Mr. Ranseth's facial pain was a trigger for headaches and migraines, and this facial pain had not resolved prior to the MVA. However, that does not inherently mean that the facial pain would not have gone on to diminish, and that that particular pain trigger would have remained unresolved. Indeed, the first of these events, the diminishment of the facial pain, did in fact occur. That process was underway at the time of the MVA. It was one of the ongoing issues that Dr. Wittington, who had recently started seeing Mr. Ranseth clinically prior to the MVA, had undertaken to try to resolve.

[146] Dr. Wittington testified that when she began seeing Mr. Ranseth in the fall of 2018, he had ongoing facial pain and vision issues that in her opinion were unresolved, and required investigation and treatment. She began by initiating investigations to eliminate a diagnosis of tumor, which was fortunately eliminated. Dr. Wittington testified that it became evident that Mr. Ranseth's broken jaw had not healed properly after the 2016 surgery, and was causing temporomandibular joint ("TMJ") disfunction. She requested WSBC to provide funding to treat this, and then referred Mr. Ranseth to what she described as the "best specialist in British Columbia" for TMJ therapy, which he attended until March 2021.

[147] As of trial, Mr. Ranseth attested to significant improvement in his facial pain, particularly in his lower jaw. He continues to experience some intermittent pain in the upper jaw and facial area, but has adapted to avoid chewing foods that trigger that pain. Dr. Wittington confirmed that Mr. Ranseth's TMJ symptoms have "definitely improved" since the TMJ treatment.

[148] Dr. Wittington also explained that the double vision Mr. Ranseth had been experiencing prior to the MVA was caused by misalignment of his eye sockets after the 2016 facial surgery. Once diagnosed, this symptom was addressed, although not completely resolved, by modified glasses that WSBC purchased for Mr. Ranseth.

[149] Importantly, Dr. Wittington was of the view in December 2018 that these unanswered questions should be addressed before Mr. Ranseth should be authorized to drive a semi-truck. The defendant emphasizes that Dr. Wittington held

this view on December 14, 2018, three days *after* the MVA. However, that does not establish the proposition the defendant urges—that even after the MVA, Dr. Wittington was of the view that Mr. Ranseth should not be authorized to drive a semi-truck *because of* his pre-MVA symptoms. The reality is more nuanced than that. Dr. Wittington testified that in fact she thought the plan to retrain Mr. Ranseth to drive a truck was "actually a pretty good idea" since he could not work as a mechanic anymore. Her concern was that his chronic facial pain and double vision should be addressed so as to diminish the triggers for headaches before he returned to work. As set out above, these symptoms in fact were subsequently addressed and diminished through TMJ therapy and modified glasses.

[150] Accordingly, based on what I have set out above and on the whole of the evidence, I find the MVA caused the headaches and migraines Mr. Ranseth continues to suffer on the standard of causation established in *Athey.* However, I do not find that these headaches cause so frequent an interruption in Mr. Ranseth's ability to carry on with activities that they are the cause of his inability to work or carry out household tasks.

Psychiatric and Cognitive Symptoms

[151] Dr. Ganesan, the only psychiatric expert who testified at trial, assessed Mr. Ranseth prior to his report of November 27, 2023. He diagnosed Mr. Ranseth with:

a) somatic symptom disorder;

b) post-traumatic stress disorder ("PTSD") (mild);

c) generalized anxiety disorder (mild to moderate); and

d) difficulties with cognitive function, particularly memory.

[152] Dr. Ganesan, who was called to testify by the plaintiff, said these were all aggravations by the MVA of conditions Mr. Ranseth suffered before the MVA. There

is no dispute between the parties that both the WPI and MVA were causal contributors to these diagnoses.

[153] While Dr. Ganesan recommended treatment, his view was that Mr. Ranseth's prognosis was poor due to the particular nature and combination of Mr. Ranseth's three sets of symptoms:

a) pain symptoms;

b) emotional symptoms; and

c) cognitive function.

[154] Dr. Ganesan emphasized the interaction between these three sets of symptoms as a "vicious circle" where each can contribute to the others, and said the combination of the three has a very poor prognosis. For example, even where effective counselling may assist with the emotional symptoms, the prominence of the pain symptoms may hinder positive progress in symptoms overall. By contrast, improvement in pain symptoms may have a positive impact on the emotional and cognitive symptoms. However, a negative turn for any of the three areas of symptoms may have negative impacts overall.

[155] I have no hesitation in concluding that the MVA caused, as causation is defined in *Athey,* of all four of the diagnoses attested to by Dr. Ganesan.

[156] The real dispute between the parties is whether Mr. Ranseth's psychiatric and cognitive symptoms are compensable injuries in this case.

[157] The defendant argues that Mr. Ranseth is a "crumbling skull" plaintiff "in that his mood required treatment at the time of the [MVA]", and further, that any disability stemming from the psychological diagnosis is "mild" as Dr. Ganesan opined, and "there is no evidence that the emotional diagnoses cause vocational disability."

[158] While there is no dispute between the parties that Mr. Ranseth's psychiatric and cognitive symptoms do not contribute to his loss of earnings claim, the plaintiff

does say that Mr. Ranseth's mental health is relevant to the non-pecuniary damages' analysis. He argues that Mr. Ranseth's mood was improved just before the MVA, and that this was justified—he had battled back from a terrible injury. He argues that Mr. Ranseth's mental health decline since the MVA must be seen as being largely caused by the new disability and injury to his back.

[159] I will address the likelihood that Mr. Ranseth would have suffered psychological and cognitive issues in a 'without MVA' scenario in the damages analysis later in these reasons.

Summary of Findings Respecting Plaintiff's Injuries, Functional Limitations and Disability

[160] On the whole of the evidence, I find that Mr. Ranseth's dominant source of pain as of the date of trial is lower back and hip pain, both of which were caused solely by the MVA. Moreover, I find that his back and hip pain cause Mr. Ranseth to suffer serious functional limitations, including being unable to sit, stand or walk for any reasonable period of time without pain. Further, he cannot lift moderately heavy objects without pain, nor bend forward or transfer between lying and seated positions to standing without pain.

[161] The pain Mr. Ranseth experiences resulting from the MVA acts as a trigger for headaches and migraines for him. While this pain may not be the only trigger for Mr. Ranseth's headaches and migraines, it is, on the evidence, a significant contributing factor. However, I am not of the view that Mr. Ranseth's headaches and migraines were, as of the date of trial, functionally disabling. While he does continue to get headaches occasionally, he is sometimes able to quell the impacts with extra strength Tylenol, and where that does not work, he will take Gravol or morphine. Occasionally, he cannot function for a day due to migraine, but there was not sufficient evidence to establish that this is occurring at a frequency to take it beyond the scope of a managed medical condition into being considered functionally disabling such that it prevents him from maintaining his home or being competitively employed.

[162] Another secondary impact Mr. Ranseth suffers as a result of the MVA-caused pain is to his psychological well being, and to a lesser extent, to his cognitive functioning. I accept Dr. Ganesan's opinion that the physical pain Mr. Ranseth experiences in his lower back and hip has caused the somatic symptom disorder Mr. Ranseth suffers, and has contributed to the depressive and anxiety symptoms he suffers.

[163] The loss of hope Mr. Ranseth suffered after having fought to recover from the WPI only to be debilitated by pain from the MVA, as well as the day-to-day reality of his current level of disability has contributed to the mild depressive symptoms Dr. Ganesan observed. Furthermore, Dr. Ganesan's evidence was that the PTSD relating to his memories of the MVA, likely in addition to the WPI, overlay the anxiety symptoms he experiences. Accordingly, I find that the MVA has significantly contributed to Mr. Ranseth's psychological symptoms. The causal connection is therefore established.

[164] However, I do not find that Mr. Ranseth's psychological symptoms are themselves disabling. As Dr. Ganesan described, they are generally in the mild to moderate range. It is not Mr. Ranseth's psychological symptoms that prevent him from living the life he would wish. If Mr. Ranseth could physically do regular tasks and activities, I am not of the view that his psychological symptoms would be a barrier to the way of life he used to know and enjoy.

[165] I make a slightly different finding with respect to Mr. Ranseth's cognitive limitations. While I accept the view of the experts that Mr. Ranseth's problems with short term memory and attention preceded the MVA and were initially caused by the mTBI he incurred in the WPI, I find nevertheless that the MVA has contributed meaningfully to Mr. Ranseth's cognitive limitations, and that these limitations do contribute to his vocational disability. I accept the opinion of Drs. Ganesan and Cameron that the MVA worsened the existing impacts of the mTBI. Additionally, the particular pain caused by the MVA, the lower back pain, causes Mr. Ranseth to wake several times a night, which is inhibiting restorative sleep. While there may be

other causes to Mr. Ranseth's waking that are not related to the MVA, the evidence establishes that his back pain is a significant cause. In turn, the inhibition of restorative sleep increases the prominence of the cognitive deficits in short-term memory and attention. These, in my view, contribute to vocational and, to some extent, functional disability. While Mr. Ranseth may be able to do some home maintenance and self-care activities with short term memory and attention deficits, there is no evidence or suggestion by the defendant that he could find competitive employment with these limitations. Again, these cognitive limitations are not the primary source of his functional limitation, which is his back and hip pain, but they derive in part from that pain and in turn contribute to his functional limitation. This in turn contributes to his psychological symptoms. This is the "vicious circle" Dr. Ganesan described in testimony. The MVA is a directly causal or significant contributing factor to all aspects.

[166] I do not find that the MVA is a cause of any neck, arm or facial pain Mr. Ranseth has experienced post-MVA. Nor does Mr. Ranseth allege this. To the extent Mr. Ranseth does continue to experience any of these pains, I do not find that they contribute to his functional limitations. Mr. Ranseth's facial pain was significantly reduced by the TMJ therapy he underwent up to 2021, and the residual pain is largely managed through his diet modifications to avoid difficult chewing. There was no evidence that his neck pain or discomfort inhibits his ability to sit, stand, walk, lift, or bend over, whereas his back and hip pain do. Nor was there evidence that neck pain inhibits him in other activities of daily life. As for arm pain, Mr. Ranseth testified that he does not continue to experience arm pain. While Ms. Lane, one of two occupational therapists who saw Mr. Ranseth, reported that she observed Mr. Ranseth exhibiting signs of arm pain in reaching above his head performing household tasks, Mr. Ranseth was not asked about this on cross-examination, and it was not confirmed that the source of pain was in fact Mr. Ranseth's arm. On the whole of the evidence, I do not find that Mr. Ranseth is suffering, or functionally disabled by, arm pain.

[167] While as I explain later in these reasons, I accept several of the expert recommendations for treatment to mitigate Mr. Ranseth's symptoms, I note that no expert expects Mr. Ranseth's condition to improve meaningfully despite the relief that may be offered by treatment given the time that has elapsed since Mr. Ranseth incurred the injuries in the MVA. I find as a fact that it is very unlikely that Mr. Ranseth's injuries and the resulting pain will fully or substantially resolve in the future.

Damages

General Principles

[168] As Justice Warren put it in *Brill v. Forsyth*, 2024 BCSC 124 at para 104:

> …. it is essential to distinguish between causation as the source of a loss, on the one hand, and the rules of damage assessment in tort, on the other. Where there may be a tortious cause and a non-tortious cause (such as a pre-existing condition), so long as the tortious act is a cause of the plaintiff's loss, the defendant is fully liable. However, in assessing the appropriate quantum of damages required to return the plaintiff to their original condition, it is necessary to take account of any measurable risk that a non-tortious cause, such as a pre-existing condition, would have detrimentally affected the plaintiff, regardless of the defendant's negligence.

[169] In *Meckic v. Chan*, 2022 BCSC 182, Justice Kent reviewed the legal principles governing the assessment of damages in personal injury cases, including the analytic framework endorsed by a trilogy of decisions decided by our Court of Appeal:

> **A. The "Simple Probability" Standard of Proof**
>
> [109] The assessment of damages in a personal injury case necessarily deals not only with past events but also with hypothetical and future events. The standard of proof for past events is, of course, the balance of probabilities and, once proven, such matters are treated as certainties. Hypothetical or future events, on the other hand, need not be proved on a balance of probabilities standard; instead, future or hypothetical possibilities are taken into account so long as they are "real and substantial possibilities and not mere speculation, and they are given weight according to their relative likelihood": *Athey v. Leonati*, [1996] 3 SCR 458, paras. 27-29; *Grewal v. Naumann*, 2017 BCCA 158, paras. 44-49.
>
> [110] The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absence of the defendant's negligence. This is the plaintiff's "original" or "without-

accident" position. This is then compared with the plaintiff's "injured" or "with-accident" position and the difference between the two represents the plaintiff's loss: *Athey*, para. 32.

[111] There are thus four scenarios which the Court is required to assess:

1. What actually happened to the plaintiff in the past to the date of trial, a determination that includes life events between the accident and the trial, all of which, once proven on a balance of probabilities, is treated as a certainty;
2. What would have occurred to the plaintiff between the date of the accident and the trial, had the accident not occurred (a past hypothetical "without-accident" scenario);
3. How would the plaintiff's life have proceeded in the future if the accident had not occurred (a future hypothetical "without-accident" scenario); and,
4. How will the plaintiff's life proceed in the future now that the accident and resultant injury has occurred (the future hypothetical "injured" or "with-accident" scenario).

[112] Scenarios 2 to 4 above involve past or future hypothetical possibilities which, as noted, will be taken into consideration so long as they are "real and substantial possibilities" as opposed to "mere speculation". This of course begs the question: how does one determine the difference between the two and, once the former is established, how does it apply to the quantification of damages?

[113] The leading text on personal injury damages in Canada is Ken Cooper-Stephenson & Elizabeth Adjin-Tettey, *Personal Injury Damages in Canada*, 3rd ed (Toronto: Carswell, 2018). Chapter 2 of that text addresses "Proof of Damages" and discusses the "simple probability" standard of proof and its application to the assessment of damages contingent upon chance. The word "probability" is used in its statistical sense, i.e. denoting <u>any</u> degree of chance.

[Emphasis added by Kent J.]

[114] Some of the substantive principles set out in the text include the following (citations omitted):

- The "simple probability" standard of proof evaluates the degree of probability that any sequence of events will occur or would have occurred, and therefore the degree of probability that the plaintiff will suffer or would have suffered the material loss. It then awards damages for the material loss proportionate to the established degree of probability;
- The Court thus estimates what are the chances that a particular event will or would have happened, usually expressed as a percentage, and reflects those chances in the amount of damages which it awards;

- All contingencies, positive or negative, that are established on the evidence as realistic as opposed to merely speculative possibilities must be given effect;
- However, there comes a point when a chance or probability is so small that it might be characterized as "speculative", or "too remote" and thus excluded from consideration; and,
- The plaintiff recovers damages in proportion to the likelihood that the event and its consequences might have or may occur; this is done by scaling the award downwards or upwards in accordance with the percentage likelihood.

[115] In *Athey* the example of the simple probability standard being applied was:

> if there is a 30% chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30% of the anticipated extra damages to reflect that risk (para. 27).

B. The BCCA Trilogy

[116] In 2021, the BC Court of Appeal issued a trilogy of judgments clarifying the above principles and illustrating their application to the assessment of damages in personal injury cases. The cases include *Dornan v. Silva*, 2021 BCCA 228, *Rab v. Prescott*, 2021 BCCA 345 and *Lo v. Vos*, 2021 BCCA 421. They involved hypotheticals and contingencies related to pre-existing injuries, past and future loss of earning capacity, future care costs, as well as non-pecuniary general damages for past and future pain and suffering.

[117] In *Dornan*, the Court noted in para. 92 that contingencies fall into two categories namely,

- "general contingencies" which simply as a matter of human experience are likely to be experienced by everyone and which are often "not readily susceptible to evidentiary proof" but which "may be considered in the absence of such evidence" nonetheless; and,
- "specific contingencies", ones peculiar to the particular plaintiff which must be supported by evidence that their occurrence is actually realistic as opposed to simply a speculative possibility.

[118] Insofar as general contingencies are concerned, the Court must be mindful that they can be positive as well as negative i.e. that everyone's life has "ups" as well as "downs" and that any allowance premised only on general contingencies "should be modest".

[119] Insofar as specific contingencies are concerned, however, whether positive or negative in nature, the Court must go beyond a determination of their existence to also analyze the evidence and decide the relative likelihood of their occurrence and their consequences.

[120] *Dornan* explains the difference between a contingency that is a real and substantial possibility as opposed to mere speculation:

> A risk that is a real and substantial possibility, and not mere speculation, is a risk that is measurable (para. 63).
>
> [Emphasis added by Kent J.]

[121] Elsewhere in the judgment, the Court stated that,

> the risks commonly encountered on this rather dangerous planet [e.g. car accidents, tripping and falling, etc.] will not suffice to establish a real and substantial possibility..... such events can happen to anyone but....are not predictable..... [and thus] would not give rise to a measurable risk (para. 77).
>
> [Emphasis added by Kent J.]

[122] In *Dornan*, the trial Court applied a 30% reduction to the awards for non-pecuniary damages, past wage loss, loss of future earning capacity and future care costs to reflect the negative contingency that, given his lifestyle and history, the plaintiff was at risk of suffering a concussion with serious consequences in any event. The Court of Appeal upheld the finding that a further without-accident concussion was a real and substantial possibility for the plaintiff, however reduced the contingency deduction from 30% to 15% for future losses (and to only 10% for past losses) based on its own analysis of the second step in the process, namely determining the relative likelihood that the real and substantial possibility would actually materialize (an analysis that the Court of Appeal said the trial judge did not actually undertake: "in this case, the judgment addresses the real and substantial possibility analysis only implicitly, and is silent on the relative likelihood", para. 135).

[123] The Court of Appeal acknowledged that the task confronting the trial judge was "not easy":

> By definition, we are dealing with possibilities, and there is no one right answer. But the law provides one right process, which, of course, must be tethered to the evidence, not to averages and approximations based on imprecise evidence (para. 134).
>
> [Emphasis added by Kent J.]

[124] The "right process" insofar as specific contingencies is concerned (in *Dornan*, the possibility of the plaintiff incurring a serious concussion injury regardless of the accident) is:

- Step one: determine with reference to the evidence whether the hypothetical future event is a real and substantial possibility (i.e. a measurable or predictable risk as opposed to mere speculation), and if so,
- Step two: determine, again with reference to the evidence, the relative likelihood [i.e. the chances] of that event actually occurring in order to arrive at an appropriate contingency deduction (*Dornan*, para. 113, emphasis added by Kent J.).

[125] *Lo v. Vos* is another case where the trial judge applied an "across-the-board" 20% contingency deduction to the awards for nonpecuniary damages, future care costs and loss of future earning capacity on account of the plaintiff's pre-existing back conditions. The trial judge found that the accident

> caused physical injuries that contributed to chronic pain, which in turn lead to depression, anxiety and post-traumatic stress disorders rendering her totally disabled from working. However, the trial judge also concluded there was a "measurable risk" the plaintiff would have developed a major depressive disorder consequent on pre-existing lower back pain and leading to a level of pain and disability similar to the sort experienced at trial. Hence the 20% contingency deduction.
>
> [126] The Court of Appeal set aside the contingency deduction on the basis that the evidence at trial did not establish any contingent risk that was a real and substantial possibility, as opposed to simply an impermissible speculative possibility. There was no expert evidence that, absent the accident, the plaintiff had any inherent vulnerability to, or any risk of developing mental health problems because of her pre-accident conditions. While it was essential for the trial judge to consider the plaintiff's pre-existing state in the assessment of damages, whether that original state gave rise to a measurable risk of her developing, mental health problems in any event (a future hypothetical event) was "a different question requiring additional evidence" (paras. 74-78, emphasis added by Kent J.).

[170] I agree with and adopt Kent J.'s description of the applicable legal principles.

[171] As noted in the excerpt above, in *Dornan* the Court of Appeal for British Columbia adopted the distinction between general and specific contingencies as articulated by the Ontario Court of Appeal in *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1, 1990 CanLII 7005 (Ont. C.A.). Justice Grauer wrote for the Court of Appeal:

> [92] In approaching this part of the appeal, it is useful to remember that we are dealing with specific contingencies, not general contingencies. The importance of evidence in cases involving a specific contingency was discussed in *Graham* (and cited with approval by this Court in *Hussack*):
>
> > 46 …[C]ontingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, e.g., a particularly marketable skill or a poor work record. The former type of contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, where a trial judge directs his or her mind to the existence of these general contingencies, the trial judge must remember that everyone's life has "ups" as well as "downs". A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.
> >
> > 47 If a plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not

> prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility: *Schrump v. Koot*, supra, at p. 343 O.R.
>
> [Emphasis added by Grauer J.A.]

Duty to Mitigate

[172] A plaintiff has an obligation to take all reasonable measures to reduce his or her damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234.

[173] In this case the defendant pleads that Mr. Ranseth failed to follow medical advice in respect to treatment or exercise, and that he could, with due diligence, have reduced the amount of injury, loss or damage he suffered, and that accordingly he failed to mitigate his damages.

[174] However, this was not pressed in argument by the defendant.

[175] Moreover, the whole of the evidence does not support such an assertion. Mr. Ranseth has been diligent in pursuing medical treatment in an effort to alleviate his symptoms since the MVA. Where there are examples of Mr. Ranseth declining to undertake further treatments, there is no evidence to support a finding that his position was unreasonable.

[176] *Chiu v. Chiu,* 2002 BCCA 618 sets out the test for failure to mitigate by not pursuing recommended treatment:

> [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.

[177] I do not find that Mr. Ranseth has failed to mitigate his damages.

Non-Pecuniary Damages

Facts

[178] Mr. Ranseth's quality of life has been significantly diminished because of the MVA. This is so both with respect to the immediate impacts on his quality of life after the MVA, and with respect to the future quality of life he can expect.

[179] I have no difficulty in finding that Mr. Ranseth's quality of life was starkly diminished right after the MVA compared to before. He immediately faced not being able to get out of bed without pain, unable even to let his dogs out without pain. While over time the consistent intensity of this pain relented, it has remained a recurring reality for him up to the time of trial. What has remained more consistent is his inability to stand, sit or walk for reasonable periods without pain. Several months after the MVA this pain came to be accompanied by a pain in his left hip that would "lock up" sometimes while he was walking or bending. All of these symptoms have caused a significant diminishment of the quality of his life since the MVA. None of them were present before the MVA. Pre-WPI activities he had returned to before the MVA such as working on the property he lives at, cutting and transporting firewood with friends in the woods, or even helping a friend on an electrical job which involved a long commute and moving around crawl spaces, were no longer possible for him after the MVA. This remained so at trial, and the unanimous evidence of his prognosis from the experts in this case is that it will remain so for his future.

[180] This relates to another way in which Mr. Ranseth's quality of life was seriously impacted by the MVA. It took away his hope that he would return to the active lifestyle he enjoyed as a young man before the WPI, when he was 34 years old. He had worked to recover from the WPI, and two years later he was on a path to resuming activities in his life, including taking the first steps toward a new vocation.

[181] There is no question that Mr. Ranseth's quality of life had also been severely impacted by the WPI, but by December 2018 he had demonstrated significant recovery from that injury. Moreover, more recovery from the WPI was to come for him thanks to the clinical investigations undertaken by Dr. Wittington in late 2018

and 2019 resulting in the TMJ therapy and modified glasses I have previously described. He continues to live with facial discomfort from the WPI which is sometimes painful, but there is no evidence that this discomfort or pain stops him from doing the activities that are the fundamentally important ones to Mr. Ranseth, such as backroads exploring, camping, walking his dogs, working on his property and working at all. It is the MVA that has significantly impacted all of these activities.

[182] Furthermore, the MVA has caused Mr. Ranseth to suffer psychological and cognitive symptoms that he would not have suffered so severely but for the MVA. Dr. Ganesan's determination that Mr. Ranseth suffers anxiety and depression aggravated by the MVA was in part based upon Mr. Ranseth's expressions of loss of hope during his assessment:

> He said he always wished to go back to functioning. He always hoped there was a possibility of vocational assessment to determine what he can do because "I am just 41 years old. I need to have my life moving." He was crying when talking about that.
>
> He talked about "giving up" and that is in all of the talk about pain and disability; "I just try to do what I am able to do; however not able to engage in work". He said that before the accidents, he looked at work as a stress relief and now that is not possible for him anymore.

[183] Mr. Ranseth's back pain also has a material impact on his sleep, which in turn impacts his cognition.

[184] There is no indication that Mr. Ranseth was experiencing this "vicious circle" before the MVA. To the contrary, the evidence is that Mr. Ranseth was, before the MVA, feeling justified optimism that he was emerging from the difficulty of the previous two years back into active life of a relatively young man.

[185] Ms. Dina Restiaux, who has known Mr. Ranseth for many years, testified that before the MVA, as he was regaining his strength, Mr. Ranseth was beginning to seem like the "old Jeremy again", but now she observes him to be consistently more subdued.

[186] The evidence of Mr. Ranseth's friend Natalie Wiley was helpful in illustrating the diminished quality of life Mr. Ranseth now suffers. Ms. Wiley was a measured

and credible witness. She has known Mr. Ranseth since they were young. She lives in Kamloops with her family. After Mr. Ranseth's fiancée passed away in October 2022, Ms. Wiley began to drive with her daughters to Mr. Ranseth's home in Langley to help him with the household tasks he could not do. She would do this about once every month or month and a half.

[187] Ms. Wylie testified that the floors are "the worst part" of Mr. Ranseth's house because of the pile up of dog hair and dirt. She said "[y]ou see he tries to keep up with it—I've seen him try to sweep a few times but he gets back pain and it shoots right to his head and he'll be out for a bit… I know it stresses him out because he's used to living in a cleaner place. ".

[188] In the context of describing Mr. Ranseth's pile up of unwashed dishes she also said: "I know he tries…but there's not a lot of dishes left that aren't needing to be washed … just from knowing Jeremy, before he wasn't really like that, he really took pride in his space so I know this has been hard on him."

[189] Like Mr. King and Dr. Wittington, Ms. Wylie has observed the impact of pain on Mr. Ranseth's actions and demeanor: "He gets back pain a lot and I know a few times I've gone down there and … he will get any sort of back pain and he'll be down, he'll have to go down to his room and sleep it out …. He's been kind of sad, a little bit depressed but he tries to keep in good spirits; he tries his best but from when I noticed it, it seems to be a façade sometimes; he's trying his best"

[190] Ms. Wylie testified that Mr. Ranseth has appeared "devastated" when he has asked for help. She said: "he's not the kind of person who likes to ask for help, he's more the person that helps, that's just how I've known Jeremy. He's always been there for me and my family and I know this has been really hard on him. … I think he feels lonely; he's always worked very hard and had a lot of friends where he could camp and he could do all sorts of things that he cant now. It's just sad to see." Ms. Wylie was tearful in describing these observations.

[191] With respect to Mr. Ranseth's need for help with household tasks, the defendant argued in closing that there were no photos in evidence that Mr. Ranseth kept a fastidious house before the MVA. However, Ms. Wylie's testimony about the apparent pride Mr. Ranseth previously held about his living space is consistent with Mr. Ranseth's testimony about the deep embarrassment he feels about the "shambles he lives in" and his diminished social contact as a result. He is reluctant to have people see how he lives now.

[192] I have considered whether there is an evidentiary basis upon which to apply a negative contingency to any non-pecuniary damage award based on a possibility that Mr. Ranseth would have suffered material psychiatric and cognitive impairment in a without accident scenario. However, a review of the whole of the evidence does not support finding this would have been a real and substantial possibility. In fact, the evidence demonstrates that Mr. Ranseth was headed in the opposite direction with respect to his psychiatric symptoms. By late 2018, before the MVA, Mr. Ranseth wanted to work, he felt good about being able to get back to physical labour, and he went out the very day he was asked by WSBC to begin the process of retraining for a new vocation to pick up the materials to get started. Ms. Restiaux described him as returning to the "old Jeremy" again. Dr. Wittington described him as a "reasonably lively person" in August 2018. Moreover, both Mr. Ranseth and Dr. Ganesan testified that his present depressive and anxiety symptoms relate to the loss of hope he had before the MVA, and the weight of the reality that he will not be able to live his life the way he had been and had been working to return to.

[193] In my view, with respect to each of the diagnoses explained by Dr. Ganesan, the evidence does not support a real and substantial possibility that Mr. Ranseth would have suffered these symptoms to the material degree he now does in a 'without MVA' scenario:

a) Somatic symptom disorder: Dr. Ganesan testified that when Mr. Ranseth's pain symptoms were aggravated after the MVA they became more debilitating. This is supported by the whole of the evidence. Mr. Ranseth

was more debilitated by pain after the MVA than before. Furthermore, the increased pain and disability after the recovery he had gained post-WPI "dashed his hopes" as Dr. Ganesan put it. This too is supported by the evidence: all experts who testified were of the view that Mr. Ranseth will likely not recover to a functional level. As I have said, the whole of the evidence does not support the defendant's assertion that that was also so pre-MVA.

b) PTSD: Dr. Ganesan was of the view that both the WPI and the MVA were of a nature that they had the potential to contribute to PTSD; however, he put more weight on the MVA as a contributing cause because of Mr. Ranseth's experience of being stuck in the truck partially submerged in water with the live wires flashing outside awaiting rescue.

c) Anxiety and depressive symptoms: The defendant sought to emphasize the emotional impact of the death of Mr. Ranseth's fiancée in 2022. However, by late 2023 Dr. Ganesan was of the view that Mr. Ranseth had largely overcome the acute impacts of that grief. Dr. Ganesan observed that Mr. Ranseth was tearful on a couple of occasions in his assessment, "especially when describing the lack of improvement and lost opportunity for training." Dr. Ganesan was of the view that Mr. Ranseth experiences an overlay of anxiety and PTSD symptoms, which are combined with depressive symptoms, and that overall his generalized anxiety disorder is mild to moderate. Given this, I do not find there is a real and substantial possibility that these symptoms would have been or remained a significant factor in Mr. Ranseth's life without the impacts of the MVA.

d) Cognitive difficulties and memory: Dr. Ganesan was of the view that the cognitive function difficulties in the area of memory and attention were likely residual from the mild traumatic brain injury suffered at the time of the WPI and exacerbated by the MVA. Dr. Cameron opined:

> Patients who have suffered a previous traumatic brain injury and who have residual cognitive problems often have exacerbation or

> reactivation of cognitive dysfunction following a subsequent significant physical injury even if they did not suffered [*sic*] a repeat traumatic brain injury. This is the case with Mr. Ranseth in my opinion.

[194] This was not challenged on cross-examination. While Mr. Ranseth did suffer cognitive impacts from the mTBI incurred in the WPI, there was no evidence that these impacts were materially impairing his ability to function or his quality of life in the period before the MVA. While his susceptibility to experiencing more severe cognitive impairment from the MVA was likely increased because of his pre-existing mTBI, that does not lead necessarily to the conclusion that he would have experienced material cognitive impairment in the future without the MVA. Given his level of cognitive function before the MVA, I do not find there is a real and substantial possibility that he would have suffered any significant cognitive impairment without the MVA.

[195] On the whole of the evidence, I do not find a basis upon which to apply a negative contingency to any non-pecuniary damages award in this case.

Law

[196] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities: *Langford (City) v. Matthews*, 2024 BCCA 214 at para. 44. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide and damage awards in each case will vary to meet the specific circumstances of that case: *Howes v. Liu*, 2023 BCCA 316 at para. 26.

[197] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages:

> [46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:
>
> a) age of the plaintiff;
>
> b) nature of the injury;
>
> c) severity and duration of pain;

> d) disability;
>
> e) emotional suffering; and
>
> f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> g) impairment of family, marital and social relationships;
>
> h) impairment of physical and mental abilities;
>
> i) loss of lifestyle; and
>
> j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[198] An award for non-pecuniary damages is determined by a functional approach that depends not only on the gravity of an injury but also on the plaintiff's circumstances: *McCliggot v. Elliott*, 2022 BCCA 315 at para. 44; *Langford (City)* at para. 44. Assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[199] The correct approach to assessing injuries that depend on subjective reports of pain was discussed in *Price v. Kostryba*, 70 B.C.L.R. 397, 1982 CanLII 36 (S.C.), (recently referred to with approval in *McGlue v. Girvan*, 2024 BCCA 208 at para. 48). In referring to an earlier decision, Chief Justice McEachern said at 4:

> In *Butler v. Blaylock*, [1981] B.C.J. No. 31, decided 7th October 1981, Vancouver No. B781505, I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:
>
> > I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.
> >
> > An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

[200] I refer to McEachern C.J.'s caution in part to highlight the significant distinction between this case and one in which there is only the subjective report of continuing pain in the face of little or no objective evidence of continuing injury. By contrast in this case the evidence of the medical experts in this case supported the finding that Mr. Ranseth has continuing musculoskeletal injuries that are not expected to resolve significantly beyond the level they had as of trial, and that he is not exaggerating his experiences of pain.

Conclusion on Non-pecuniary Damages

[201] Mr. Ranseth quantifies his non-pecuniary damages claim at $220,000. He relies on *Wang v. McNaught,* 2017 BCSC 454 as a comparator. In that case the plaintiff, in his mid-40s, suffered neck and back pain which became chronic. He developed depression and PTSD. The Court found that before the accident, he was "physically vigorous and enjoyed many demanding activities" such as hiking, skiing and swimming, but was unable to do these after the accident. He was awarded $175,000 in non-pecuniary damages ($211,000 adjusted for inflation).

[202] Mr. Ranseth says *Wang* is an appropriate comparator because he suffered back and hip injuries that continue to disable him now five and a half years after the car crash. He says he also suffered an aggravation of his migraine headaches to the point of nausea and vomiting. While he has them under control again with the adaptations he has made to his way of life, it took him some time to get there, and he must live with the modified way of life.

[203] Mr. Ranseth points to the significant work he had done to recover from his WPI, and that his mood, energy and activity were all justifiably elevated before the MVA because he had successfully battled back from a terrible injury. Then it was, he says, all for naught. He has suffered a significant mental health decline since the MVA because of the back injury which disables him when he moves and when he sits, and which feels ever present. He cannot do the things he enjoys, like driving, working on his property, long walks with his dogs. He cannot do basic housekeeping without pain. He confines himself to his house, and he is embarrassed to have

friends over because of the shambles his place is in, unless someone helps him with household cleaning.

[204] The defendant submits that an award in the range of $85,000-$95,000 is instead appropriate, citing the following cases:

- *Coulombe v. Morris*, 2021 BCSC 2034, in which a 2017 motor vehicle accident caused the 36-year-old plaintiff temporary aggravations of pre-existing symptomatic neck, shoulder and back pain, and caused new injuries such as vestibular mismatch and balance problems that were ongoing as of trial.. The Court awarded $85,000 in non-pecuniary damages.

- *Klimek v. Lockhart*, 2023 BCSC 582, in which non-pecuniary damages of $86,250 was awarded based on an assessment at $115,000 (less 25% for contingencies). In that case, the 48-year-old plaintiff (at the time of the motor vehicle accident) had suffered an aggravation of chronic pain in the back, neck and shoulder, depression and post-concussion symptoms. The post-concussion symptoms were resolved at trial, but the others continued. These symptoms had impacted her ability to enjoy her work, fulfill her career aspirations and maintain her home to the standard she previously had. She was unable to enjoy gardening or social activities as she had before, and could no longer go camping or enjoy long road trips. Her symptoms had led to sleep disruption, anxiety and depression. Her depression had led to despair about her condition and life in general. Her family and friends had observed that she was no longer her former cheerful self.

- *Austin v. Glass*, 2023 BCSC 1483, in which the 26-year-old plaintiff (31 at trial) suffered indivisible injuries from three distinct events: a) a 2016 hockey accident, b) the subject motor vehicle accident, and c) a 2020 workplace accident that permanently disabled the plaintiff from working. The Court attributed a deduction of 20% to his pre-existing injuries and 50% to the 2020 workplace accident, awarding a total of $95,000 in respect of the pain and suffering attributable to the motor vehicle accident.

- *Watt v. Vick*, 2021 BCSC 218, in which the Court ordered $85,000 in non-pecuniary damages for ongoing symptoms that were mild by the time of trial.

[205] In my view, *Wang*, relied upon by the plaintiff, and *Klimek*, relied upon by the defendant, are appropriate comparators.

[206] I do not agree with the defendant that *Coulombe* is an appropriate comparator. Unlike *Coulombe*, the plaintiff in this case has suffered debilitating and likely permanent back pain that is entirely caused by the MVA; it is not a temporary aggravation of a pre-existing back pain. Furthermore, unlike in *Coulombe* where the Court found that the plaintiff's "lifestyle and relationships are no different now than they were prior to the 2017 Accident" (at para. 44), Mr. Ranseth is no longer the "old Jeremy" he was becoming again before the MVA. He is unable to socialize with his friends as he used to through outdoor activity, and he is embarrassed to have people to his home. Mr. Ranseth's lifestyle and relationships have been fundamentally affected by the injuries he incurred in the MVA.

[207] Nor do I find *Watt* to be an appropriate comparator given that Mr. Ranseth's symptoms were not mild at the time of trial.

[208] I also do not find *Austin* to be a helpful comparator, despite the defendant's submission, given that Mr. Ranseth's predominately debilitating injury is his back injury, which arose solely from the MVA. I also note Justice Basran made the following finding about the plaintiff in *Austin*:

> [27] In light of my concerns with both the credibility and reliability of Mr. Austin's evidence, I have relied on documentary and expert evidence in finding the necessary facts that does not depend on Mr. Austin's veracity or reliability.

[209] This lies in contrast to my positive credibility findings about Mr. Ranseth, as well as the credible lay witness evidence of those who have known Mr. Ranseth for years, as well as of Drs. Wittington and Purkis, who observed him before the MVA.

[210] *Wang* and *Klimek* are appropriate comparators because the severity and endurance of the injuries are similar to the case before me. I would not, however,

apply the contingency that was assessed in *Klimek* based upon the plaintiff's pre-existing chronic pain in that case. As I have explained, I find that Mr. Ranseth's lower back and hip pain are the injuries that cause the pain and limitations that are meaningfully and significantly impacting the quality of his life. I am not persuaded that there is a real and substantial possibility he would be suffering the impacts to his quality of his life without the MVA. I have also explained I do not find a basis upon which to apply a negative contingency for psychological and cognitive symptoms. Accordingly, there is no basis in this case to apply a negative contingency to his non-pecuniary damages based on pre-existing conditions.

[211] Further, I find that Mr. Ranseth's pecuniary damages award should be higher than those assessed in *Klimek* due to the more comprehensive nature of Mr. Ranseth's pain and the losses it causes him. Not only can he not do the things he enjoyed before like exploring back roads by truck and quad, camping, and getting firewood, he cannot do basic self-maintenance like housecleaning and personal hygiene without pain.

[212] I assess Mr. Ranseth's non-pecuniary damages at $190,000.

Loss of Earning Capacity: Past and Future

[213] It is not disputed, and I have found, that Mr. Ranseth is vocationally disabled.

[214] In the circumstances of this case both the claims for past and future loss of earnings engage a common hypothetical question: would Mr. Ranseth have been unable to work or independently care for his home and property even if the MVA had not occurred?

[215] While it is undisputed that Mr. Ranseth has been unable to work since the MVA, and that he will not be meaningfully employable in the future, the defendant argues that a very large negative contingency must be applied to any assessed earnings capacity loss, because he was not, and therefore would not have been, employable because of injuries that preceded the MVA.

[216] It is clear that Mr. Ranseth has not returned to working after the MVA. I have found the causal link between the injuries from the MVA and Mr. Ranseth's functional and vocational disabilities, in particular his back and hip pain (both functionally and vocationally disabling), and his cognitive limitations (vocationally disabling).

[217] It is also established on the expert evidence that there is a real and substantial possibility that Mr. Ranseth's current level of disability will not meaningfully improve. As there was no evidence to suggest that there was a likelihood of meaningful improvement to his physical or cognitive conditions, I find that there is a high relative likelihood that Mr. Ranseth's condition will not meaningfully improve in the future.

[218] Accordingly, I have found on a balance of probabilities (with respect to actual past events) that Mr. Ranseth's injuries arising from the MVA have caused his earning capacity to be entirely impaired, with no evidence of residual earning capacity. Furthermore, I find there is a real and substantial possibility and a high likelihood that his earning capacity will remain entirely impaired in the future.

[219] However, answering these questions does not eliminate the need to determine whether there is also a real and substantial possibility that Mr. Ranseth would not have begun working again or been able to care for his home and property independently after December 11, 2018 (the date of the MVA) even if the MVA had not happened. This is the "crumbling skull" principle. The defendant is not obligated to put the plaintiff into a better position than he would have been had the accident had not happened.

[220] Further, assuming that I do not find there to be a 100% likelihood that Mr. Ranseth would not have been able to work again even if the MVA had not happened (or put another way, assuming I find there is a real and substantial possibility that Mr. Ranseth would have resumed competitive employment but for the MVA), I must also determine the hypothetical question: what would the plaintiff have earned if the MVA had not happened? This is perhaps less predictable in this case than in some because the evidence is that Mr. Ranseth would not return to the work

he did before the WPI, and had not returned to any employment by the time of the MVA. It is, however, determinable on the evidence on the real and substantial possibility standard.

[221] The further questions that follow these are:

a) Past earning capacity loss: when would he have started to work again?

b) Future earning capacity loss: how long would he continue to have performed the work?

[222] Assessing the value of pre-trial and future earnings capacity loss is best done on an earnings approach if a loss is established. The positions of the parties are either that (a) as the plaintiff argues, Mr. Ranseth would have gone back to work within a year as a truck driver or crane truck driver and operator or (b) as the defendant argues, Mr. Ranseth could not work before the MVA and could not work after the MVA and accordingly his earnings losses should be assessed at 0; but alternatively, his losses should be assessed based on his previous salary as a mechanic with significant negative contingencies applied based on pre-existing conditions. Either way, these are losses that are measurable, given the direct and expert evidence on the expected earnings in all of these scenarios. Therefore, the earnings approach is more useful in this case: *Lamarque v. Rouse*, 2023 BCCA 392 at para. 38.

Summary of Findings

[223] As I have explained, I have found on a balance of probabilities (actual past event) that the reason Mr. Ranseth did not and has not returned to competitive employment since the date of the MVA is the injuries caused by the MVA.

[224] For the reasons I set out below, I further find that there is a real and substantial possibility that Mr. Ranseth would have returned to work, but for the MVA. Based on the whole of the evidence, this was a high likelihood.

[225] I also find that there is a real and substantial possibility that Mr. Ranseth would have worked as a truck driver and crane operator**.** I find there is a high likelihood he would have worked as a truck driver and a high likelihood he would have subsequently worked as a crane operator.

[226] It was, however, plain on the evidence that Mr. Ranseth was not about to start work right away in December 2018; there was still some healing to come—Mr. Ranseth's TMJ treatments and the determination that misaligned eye sockets were causing his occasional double vision and could be partially corrected with modified glasses both began in 2019. As noted, these improved his facial pain and double vision, which were in turn triggers for headaches. As I have found, his headaches were not vocationally disabling at the time of the MVA. Nevertheless Dr. Wittington was of the view that while retraining for truck driving was a good idea, it was important to improve the TMJ symptoms and double vision, and the headaches, before sending Mr. Ranseth back to work again.

[227] Furthermore, there was training to do. The evidence was that Mr. Ranseth needed to get his Class 1 licence in order to qualify to drive a semi-truck. While there was not evidence about how long that would take, Mr. Ranseth went out to get the learner's manual the very day he was instructed to do so by WSBC. There is no evidence he would delay the process. Mr. Ponting testified that training for crane operating takes two to three weeks.

[228] I am satisfied there is a real and substantial possibility that Mr. Ranseth would have begun working within approximately a year of the MVA, but for the MVA. This was of a high relative likelihood, both for truck driving and crane operating.

[229] Accordingly, I accept the January 1, 2020 date employed by Ms. Clark in her report, which also forms the basis of Mr. Gosling's calculations in his responding report.

Would the plaintiff have returned to working but for the MVA?

[230] As I have explained above, it is common ground that Mr. Ranseth is not competitively employable because of his physical limitations. The defendant does not argue that Mr. Ranseth could work in an adapted, sedentary field. The defendant did not, by closing argument, dispute that Mr. Ranseth is vocationally disabled. And, of course, this was the position of the plaintiff at trial. I agree with the parties. There was no evidence before the Court of any realistic work Mr. Ranseth could perform for any sustained period given his physical limitations.

[231] However, I do not agree with the defendant's assertion that Mr. Ranseth was vocationally disabled before the MVA, and is vocationally disabled after it, and accordingly suffered no significant loss attributable to the MVA.

[232] The problem with that approach is it equates Mr. Ranseth's hypothetical future with the "snap shot" (to use defence counsel's words) of the period just prior to the MVA. But that is not the inquiry the law requires. As set out above, the second and third scenarios the Court is required to assess guide the analysis at this stage:

> 2. what would have happened to the plaintiff between the date of the accident and the trial, had the accident not occurred (a past hypothetical "without-accident" scenario); and
>
> 3. how would the plaintiff's life have proceeded in the future if the accident had not occurred (a future hypothetical "without-accident" scenario).

[233] In my view, the evidence does not support the proposition advanced by the defendant that Mr. Ranseth would have, without the MVA, remained functionally disabled as he had been in the two years following the WPI. In fact, the evidence is to the contrary. He had already shown signs of significant functional improvement as evidenced, for example, by the day he spent in the woods cutting, loading, transporting and then unloading a significant quantity of firewood, filling his truck bed and a trailer. Another example is the day he spent in August 2018 assisting an electrician in Whistler, a 16-hour day all told, with approximately 12 hours of work,

including bending up and down and maneuvering through low crawl spaces—the sort of movement that had previously been causing him pain and impairment after the WPI.

[234] Moreover, these examples of improvement precede the important intervention Dr. Wittington brought to Mr. Ranseth's condition. Dr. Wittington watched Mr. Ranseth working that day in August 2018, and observed him to be mobile, capable and energetic. She was very surprised to learn about the extent and severity of the workplace accident he was recovering from, and even more surprised when she saw photos of the x-rays of the pins and plates in Mr. Ranseth's head. But Dr. Wittington also came to understand that there were residual aspects of Mr. Ranseth's injuries that had not yet been sufficiently addressed as of that date, so she agreed to take Mr. Ranseth on as a patient. As a general practitioner she set about trying to establish diagnoses and solutions to the problems Mr. Ranseth continued to suffer. For example, with respect to the double vision Mr. Ranseth reported experiencing, Dr. Wittington initiated inquiries to determine whether the cause might be a brain tumor. Fortunately, it was not, and those investigations revealed that his original surgery in 2016 had left him with a mild misalignment between his eyes. This was improved with specialized glasses. Similarly, Mr. Ranseth's lower jaw pain substantially improved with TMJ treatment prescribed by Dr. Wittington.

[235] These two particular issues improved after the MVA. They are not hypotheticals.

[236] The defendant argues that because Dr. Cameron testified that in the normal course a person of Mr. Ranseth's age would have reached maximum recovery from injury, both WPI and MVA, within about two years, then the Court should find that no further recovery from the WPI would have occurred by about November 2018, two years after the WPI. However, with respect, this is the sort of finding both *Dornan* and *Silva* warn against: prizing generalities and statistics over specific evidence in

the case. The fact is that Mr. Ranseth did continue to improve from his WPI-related injuries more than two years after the WPI, and even after the MVA.

[237] Further, there is no evidence that to the extent that Mr. Ranseth has persistent upper jaw pain, or pain from chewing certain foods, that these are of a nature, or are significant enough, that they would be vocationally disabling. I remind myself that even if they were to remain potential pain triggers for headaches, the evidence does not establish that headaches were vocationally disabling for Mr. Ranseth in the period before the MVA.

[238] Nor is there evidence to support a real and substantial possibility that any neck pain experienced by Mr. Ranseth before the MVA would have prevented him from returning to work in the future in a without-MVA scenario. As I have said, neck pain was not vocationally disabling in the period prior to the MVA, and even Dr. Perera did not opine that Mr. Ranseth's neck pain would get worse in the future.

[239] The defendant argues that upon discharge in January 2018 from the only formalized vocational rehabilitation he undertook, Mr. Ranseth still had difficulty stooping, crouching and heavy lifting, as he testified on cross-examination. On the evidence, this would cause him facial pain and dizziness. There was no evidence, nor is there any suggestion, that any of these would cause him the lower back pain he experienced after the MVA. The defendant also argues that Mr. Ranseth's formal rehabilitation program did not involve him sitting behind the wheel of a Class 1 vehicle for seven or eight hours a day five days a week or involve him operating crane controls. However, this ignores the evidence that Mr. Ranseth did go on ride alongs with Mr. Ponting in his trucks, and did operate his crane, all without difficulty. It also ignores everything that happened *after* Mr. Ranseth's discharge from the rehabilitation program, including WSBC's subsequent vocational assessment process and recommendation.

[240] This is a further significant factor on the evidence supporting the finding that there is a real and substantial possibility Mr. Ranseth would have returned to competitive employment: the WSBC process Mr. Ranseth was engaged in after the

WPI and up to the date of the MVA. After two years of recovery from the WPI, and several assessments, WSBC had come to the determination that Mr. Ranseth could not return to his work as a mechanic post-WPI, but had recommended he proceed with the truck driving plan. I say more about this below.

What work would the plaintiff have done?

[241] Mr. Ranseth says that but for the MVA there is a real and substantial possibility that he would have worked as a truck driver and as a crane operator. Further, he says that a starting point of earnings a year after the MVA is more than fair to the defendant. The defendant, by contrast, says that the plaintiff had little to no residual earning capacity after the WPI and therefore there is no air of reality to a diminished future earning capacity claim, whether based on earnings as a truck driver or as a crane operator.

[242] The defendant's alternative argument, if Mr. Ranseth did have residual earning capacity despite the WPI, is that the assessment of future earning capacity loss should be based upon the two years he worked as a mechanic before the WPI. However, the problem with this submission is that there is no evidence to support the proposition that there is a real and substantial possibility that Mr. Ranseth would have returned to work as a mechanic. The only evidence on this point was that we would *not* return to work as a mechanic. It is an agreed fact that on March 6, 2018, WSBC had accepted permanent medical conditions for the physical injury he had suffered in the WPI, and determined that Mr. Ranseth was unable to return to his previous work as mechanic.

[243] Nor do I accept the defendant's further alternative argument, that if the plaintiff had residual earning capacity before the MVA, it should be assessed as very modest, in line with the reasoning in *Nguyen v. O'Neill*, 2020 BCSC 2036. Justice Gomery held in *Nguyen*:

> [80] I am not persuaded that there is a real and substantial possibility that, but for the accident, Ms. Nguyen would have pursued a career in emergency services. Ms. Nguyen's prospects for such a career were merely speculative. She was 20 years old. While she had been thinking about emergency

> services for two years and had identified a post-secondary degree program as a prerequisite, she had not taken steps to apply for admission to that program. She was not nearly settled into a career path in emergency services, and she was not in a hurry to get there. I expect that she felt she had time.

[244] By contrast in the case before me, the plaintiff had been through a 9-month assessment process with WSBC from March to December 2018, including a vocational aptitude assessment and a Skills Analysis and Options Identification assessment, which resulted in WSBC producing a report and recommending the truck driving plan. Moreover, there was no delay in Mr. Ranseth acting on that plan, once recommended by WSBC. Indeed, on the very day WSBC advised him to take the next step and go to the MVB to get his Class 1 manual so that he could begin to study, he did just that, immediately driving 45 minutes to the nearest MVB.

[245] I have no hesitation in finding that it was a substantial possibility, and in fact likely, Mr. Ranseth would have begun working as a truck driver but for the MVA. In addition to the WSBC recommendation and Mr. Ranseth's immediate action to carry it out, there is additional evidence that supports finding this real and substantial possibility.

[246] Mr. Ranseth had already demonstrated the technical aptitude for semi-truck driving and has been comfortable around machines and heavy vehicles since he was a teenager. He began driving industrial trucks at a young age. When he was 16, he learned to drive a manual transmission 4x4 truck in the Andes, when he was working with his father in Peru. He also learned to drive a forklift, D6 bulldozer and a timber jack skidder. When he worked for five years at a previous job as a tug boat mechanic, he was often the employee who would drive the company's Kenworth semi-truck with a large boat trailer between Hatzic, British Columbia and Dewdney, British Columbia to launch, load and unload the tugs.

[247] Furthermore, he was motivated to begin working again. Mr. Ranseth has a strong interest in trucks, cars, mechanics, and was keen to return to work. He testified that he was "excited" at the prospect of getting back to work when the truck

and crane operating plans were being discussed with WSBC, and that "I enjoyed working, always enjoyed working."

[248] Evidence of his desire to get moving and working again after the WPI includes:

a) His work over the long day in August 2018 assisting an electrician with work on property in Whistler. This included a long commute between Abbotsford and Whistler and bending and moving throughout the day in difficult to access crawl spaces.

b) His full day of work just before the MVA sourcing, cutting, transporting and storing firewood from the forest to heat his home at Lake Errock.

c) The several times he went out driving with Mr. Ponting in his trucks and the time he practiced operating the crane on Mr. Ponting's crane truck.

d) His driving 45 minutes to Abbotsford, British Columbia to get his Class 1 licence instructional booklet on the same day he was advised by WSBC that the "truck driving plan" was going to be recommended in order to facilitate the necessary first step of this plan.

[249] The evidence demonstrates that Mr. Ranseth's capacity to do physical work, and his spirits, were improving, and he was, before the MVA, looking forward to getting back to working again. This last point is consistent with the evidence of Mr. Ponting, a friend and business owner who has known Mr. Ranseth 18 years, and who attested that Mr. Ranseth has a "great work ethic."

[250] Additionally, the clinical evidence supports the real and substantial possibility that Mr. Ranseth would have begun working as a truck driver. The defendant's witness, Dr. Purkis, testified he had no concerns with Mr. Ranseth's ability to drive throughout the time he saw him clinically from May 2017 to June 2018. Dr. Wittington thought that the truck driving plan was a good idea, subject to addressing the lingering facial pain and vision issues and related headaches

Mr. Ranseth was experiencing. As I have said, the lower jaw pain and vision issues did later improve.

[251] The defendant pointed in closing argument to a WSBC file note from December 10, 2018 which records Mr. Ranseth saying to a WSBC representative that the truck driving plan "was not his plan but the plan we [which I take to mean WSBC] thought was best for him." The defendant argues there is no better "snap shot" of Mr. Ranseth's original position than that. As I understand the defendant's argument, it is urging that this statement be taken as evidence that Mr. Ranseth was reluctant to undertake the truck driving plan, and accordingly either no real and substantial possibility should be found to attach to the truck driving plan, or a significant negative contingency should be applied to the likelihood of the truck driving plan occurring.

[252] However, while this extract from the WSBC note was an agreed fact, the defendant did not ask Mr. Ranseth about it on cross-examination. He was given no opportunity to explain what he meant by that statement. There are a variety of possible meanings that come to mind based on the evidence before the Court, several of which would be consistent with the evidence Mr. Ranseth gave, which was that he was excited about the truck driving plan, and that he viewed it as a stepping stone to becoming a crane truck driver and operator. Furthermore, these possible meanings would also be consistent with the fact that Mr. Ranseth went out later the very day of that discussion with WSBC to get the Class 1 manual so he could begin the process of studying to become a truck driver. The Court cannot know if any of these possible meanings were Mr. Ranseth's, or whether the meaning the defendant urges is what he meant. In the absence of evidence on the point, including cross-examination evidence, I give the statement no weight.

[253] The evidence supports finding a real and substantial possibility and a high likelihood that Mr. Ranseth would have found full time employment as a truck driver. Mr. Ponting testified that he would have hired Mr. Ranseth to drive one of his five tonne trucks if Mr. Ranseth had gotten his Class 3 licence. The evidence was that a

Class 1 licence is more onerous to obtain, and this was the one that Mr. Ranseth set out to get the day before the MVA. Therefore, Mr. Ranseth would have at least satisfied, if not gone beyond Mr. Ponting's requirements for employment as a truck driver. I also note the expert economic evidence of Ms. Clark, that unemployment rates for truck drivers in British Columbia are lower than that of the educational average unemployment rates in the province.

[254] I further note the evidence that Mr. Ranseth went out several times in 2018 with Mr. Ponting driving in Mr. Ponting's trucks. Mr. Ranseth did not attest to experiencing any physical difficulty on these rides. Mr. Ponting testified that the trucks are loud, but did not hear Mr. Ranseth complaining of headaches from the sound, nor did he observe Mr. Ranseth to have any headaches, dizziness or memory issues during these drives.

[255] Although it was not established on the evidence that Mr. Ranseth would need to take frequent or even occasional breaks from driving to accommodate any residual pain or discomfort he experienced from pre-existing conditions, I nevertheless also note Mr. Ponting's evidence on cross-examination that breaks from driving are not an inherent barrier to the job, and that he himself takes breaks "multiple times a day" to stretch because of the lingering effects of a past injury he had suffered.

[256] In my view, the evidence does not reveal a measurable or predictable risk beyond speculation that Mr. Ranseth would not have begun working full time as a truck driver in a without MVA scenario because of any pre-existing conditions.

[257] In finding this I will say that I found the evidence of the defendant's expert Dr. Perera to be of no assistance on this point. Dr. Perera's stated opinion that the MVA injuries did not result in vocational disability was based on his opinion that Mr. Ranseth was vocationally disabled before the MVA. Dr. Perera's report, and cross-examination upon it, reveal that this opinion is not based upon his medical examination of Mr. Ranseth, but rather, upon his interpretation of selective correspondence and reports in Mr. Ranseth's WSBC file spanning from 2018 to

2021, including correspondence from Dr. Wittington about which she testified. Both the evidence at trial, and the findings of fact I have made with respect to that evidence, are more extensive and nuanced than the brief document excerpts quoted by Dr. Perera in support of his opinion on this point. I do not find that Dr. Perera's opinion provides an evidentiary basis to take the possibility that Mr. Ranseth would not have returned to work in a without-MVA scenario beyond mere speculation.

[258] Accordingly, the evidence does support applying a negative contingency to Mr. Ranseth's future earning capacity as a full-time truck driver because of any pre-existing conditions.

[259] The analysis does not however, end here, because Mr. Ranseth testified that getting his truck driving licence was just the first step in his plan to get back to working. He testified: "I was going to get truck driving licence and then get a crane ticket so I could operate a crane truck." He explained that a crane truck is a semi-truck with a crane that sits right behind the cab (also called knuckle-boom cranes) that the operator can use to pick objects up and put them on the flat deck of the truck for transport. Examples of such objects according to Mr. Ranseth are large engines, stacks of lumber, shipping containers, "big things that aren't easy to lift."

[260] The defendant argues that employment as a crane operator was unlikely for Mr. Ranseth because WSBC had not, as of the date of the MVA, recommended the crane operating plan. This was shown on the evidence to be because Mr. Ranseth had not submitted a letter of intent from an employer for crane operating to WSBC by that time. However, the defendant's cross-examination of Mr. Ponting, who was the employer the defendant suggested such a letter should have come from, did not address or elicit any reason Mr. Ponting had not provided such a letter. The evidence did not even establish that Mr. Ponting had been asked to provide one and declined to do so.

[261] Mr. Ranseth testified that the only questions Mr. Ponting asked of him were about the training that Mr. Ranseth would receive to operate his particular crane. He

testified that Mr. Ponting did not ask any questions related to Mr. Ranseth's health with respect to the prospect of employing him as a crane truck driver and operator.

[262] Mr. Ponting gave no testimony that suggested he was concerned about Mr. Ranseth's ability to operate a crane. He testified he would not have taken Mr. Ranseth out on his trucks, which he did about 12 times, if he thought he was not capable of coming to work for his business. He testified that he would have trained Mr. Ranseth to operate his cranes but would not have paid for Mr. Ranseth to get his crane ticket, which he estimated costs $10,000-$12,000.

[263] I do not find that the absence of a letter of intent to hire Mr. Ranseth as a crane operator as of the date of the MVA is, on its own, evidence or at least sufficient evidence, upon which to find a real and substantial possibility that Mr. Ranseth would not have gone on to work as a crane operator. It is speculation.

[264] By contrast, there is positive evidence to support a finding that there is a real and substantial possibility that Mr. Ranseth would have gone on to work as a crane operator. Mr. Ranseth gave evidence that he wanted to become a crane operator, and was "excited" at the prospect. He had already demonstrated that he could physically and technically operate the crane without trouble, as he and Mr. Ponting attested. Further, Mr. Ponting's evidence establishes that there is a need and a market for crane truck operators. Mr. Ponting put it in testimony that a lot of people have Class 1 and 3 licences, but "no one has their crane ticket", citing the cost of getting the crane ticket, and the reluctance of crane owners to trust "green guys" (inexperienced people) to operate their equipment.

[265] I heard no evidence upon which to find anything but a high likelihood that Mr. Ranseth would work as a crane truck driver and operator. Cross-examination of Mr. Ponting regarding an employee's need to take breaks or the occasional sick day did not reveal that any of the conditions that persisted for Mr. Ranseth after his 2019 TMJ therapy and modified eyeglasses would have created a lower likelihood of Mr. Ranseth working as a truck driver or crane operator. Accordingly, there is no measurable basis upon which to apply a negative contingency to this future loss.

When would the plaintiff have returned to work?

[266] The plaintiff suggests it would be more than fair to the defendant to find that Mr. Ranseth would have started working a year after the date of the MVA, but for the MVA. For its part, the defendant did not advance a clear position on a hypothetical start date, focusing instead on its primary arguments. However, the defendant's economic expert, Mr. Gosling, did apply a start date of January 1, 2020 in his report.

[267] In my view, the evidence demonstrates a real and substantial possibility that Mr. Ranseth would have begun working as a truck driver before a year from the date he went to pick up his Class 1 licence manual (the day before the MVA), and that he would have begun working as a crane-truck driver and operator within a year of the MVA.

[268] Mr. Ranseth testified about his plan and the steps to become a truck driver and then crane truck operator. First, he would read the Class 1 manual he had picked up, then take the air brake course, then take the Class 1 course and then start truck driving. He would then take the crane course and then be able to be certified and go to work as a crane truck driver and operator.

[269] While there was not evidence about how long the truck driving portion of the training was expected to take, Mr. Ponting did testify about how long it takes to get the Class B ticket for crane operation, which is about two to three weeks. On cross-examination, Mr. Ponting was asked if it then takes another six months to become competent as a crane truck operator, with reference to the experience of his business partner who began as his employee. Mr. Ponting agreed it took that person six months to become fully competent as a crane truck operator, but explained that that was because "he started from nothing…no Class 1." From that evidence, I infer that there is a real and substantial possibility that Mr. Ranseth could get a Class 1 licence and become qualified and competent to operate a crane truck within six months to one year. Given that Mr. Ponting's now business partner was able to do so within six months, I find there is a high likelihood Mr. Ranseth could do so within a year.

[270] Furthermore, based on Mr. Ponting's specific evidence about his need for truck drivers and crane truck operators, as well as Ms. Clark's evidence that the unemployment rate for crane truck operators in British Columbia is lower than average unemployment rates, I find a high likelihood that Mr. Ranseth would have found and begun work as a crane truck operator by January 2020.

Past Loss of Earning Capacity

[271] Having determined that Mr. Ranseth would have (that is, there is a real and substantial possibility and a high likelihood he would have) begun to work as a crane truck operator by January 2020, I turn to the evidence of the two expert economists called by the parties in this case, Christiane Clark for the plaintiff, and Mark Gosling for the defendant. I found both witnesses to be credible and helpful in their evidence. The primary difference between them lay in whether the earnings models should incorporate as general contingencies only risks, such as illness and injury, that may limit Mr. Ranseth's future workforce participation, or risk and choice, such as retirement. Ms. Clark for the plaintiff calculated earnings loss on the risk-only model, whereas Mr. Gosling for the defendant calculated earnings loss factoring in general contingencies for risk and choice.

[272] The plaintiff argues that applying the risk and choice approach is inappropriate because many of the "choice" contingencies included in Mr. Gosling's analysis might not apply to Mr. Ranseth, such as choosing to take time away from work to care for others (spouse, children, parents) or to go to school. The problem with this submission was that, in my view, there was not sufficient evidence to establish that general labour market contingencies should not apply to Mr. Ranseth. It may indeed well be that none of those events comes to pass in Mr. Ranseth's future (as they will not in many people's lives), but there was not evidence to suggest they should be eliminated as general weighted possibilities based upon population work force statistics for Mr. Ranseth particularly.

[273] The further and more significant difficulty I have with the risk-only approach is that it requires the Court to essentially "guess" a likely age of retirement for

Mr. Ranseth, in the absence of any assisting evidence except for the generally strong work attachment Mr. Ranseth felt as a young man. By contrast, the risk and choice model put forward by Mr. Gosling factors in the chance of retirement incrementally each year and allows the Court to "run out" the model up to the age of 70, which was the maximum year each expert's projected earnings model went up to.

[274] Accordingly, with great respect to the evidence of Ms. Clark, which was very helpful in a number of ways, on this question and in the particular circumstances of this plaintiff, I prefer the risk + choice model used by Mr. Gosling. For consistency, I find that this model should be applied to both Mr. Ranseth's past and future earnings capacity loss assessments.

[275] I note that Mr. Gosling agreed with and adopted a number of the premises in Ms. Clark's calculations, including lagging Mr. Ranseth's projected census-based earnings by 18 years to account for his "late start" in his career as a crane operator. Ms. Clark assumed that when Mr. Ranseth would have entered the labour market in 2020, his earnings would not be like a person of his age, because he has no work experience in the area. She assumed his earnings would be more like someone just starting the occupation, so she started the earnings to equate to the earnings of someone around 20 years of age, not 38 (as he would have been January 1, 2020). She continued this lag throughout Mr. Ranseth's future work years, because he would not have the same experience as a person his age who had started this work young.

[276] Mr. Gosling agreed with and employed this approach. I note Mr. Gosling also agreed with and employed the following further bases for Ms. Clark's estimates:

a) Employing estimates of past and future earnings for British Columbia male high school graduates potentially working full time based on the 2021 National Occupational Classification (based on 2021 Canadian census data, which is based on 2020 earnings) group for "Crane Operators".

b) The adjustment Ms. Clark applied to the national data due to the relatively low counts for British Columbia males with completed high school education working as crane operators. She adjusted upward by about 24.7% for the overall higher earnings of high school graduates working as crane operators in British Columbia compared to Canada.

c) Ms. Clark's adjustment to bring the earnings data forward from 2020 to 2024, for which she used Statistics Canada data on changes in average British Columbia earnings for British Columbia residents over that period of time.

[277] I accept these premises which both experts have employed in their calculations as appropriate in these circumstances.

[278] Accordingly, I find that Mr. Ranseth's lost pre-trial earnings resulting from the MVA before tax and employment insurance premium deductions are $223,188, as reflected in Mr. Gosling's calculated lost earnings for a crane-operator in British Columbia from January 1, 2020 to the date of trial.

[279] Ms. Clark notes that an allowance of about 10% represents an average non-wage benefits package across all-industries in British Columbia. Mr. Gosling agreed with that assessment. I am not persuaded by the defendant's argument that this should not be applied to Mr. Ranseth's earnings losses on the basis that Mr. Ponting testified he does not provide benefits packages to his employees. That places undue weight on the possibility that Mr. Ranseth would work for Mr. Ponting, and exclusively Mr. Ponting, for the rest of his career. In my view, the evidence does not support applying such a significant negative specific contingency. Accordingly, I award an additional $22,320 in lost non-wage benefits for pre-trial capacity losses.

Loss of Future Earning Capacity

[280] On the same basis I have explained in addressing pre-trial earnings losses, I find that Mr. Ranseth's future earnings loss is $1,531,896, as reflected in Mr. Gosling's estimated lost earnings for a crane-operator on a risk + choice

contingency model (which includes the possibility of retirement throughout), working to the age of 70.

[281] I would award an additional $153,190 for lost non-wage benefits for future earning capacity losses.

Loss of Housekeeping Capacity

[282] The plaintiff argues that compensation for professional assistance required for housekeeping and loss of housekeeping capacity are two different things that in this case call for discrete awards.

[283] The defendant does not dispute this, but says that impacts to Mr. Ranseth's housekeeping capacity should be taken into account in non-pecuniary damages, not as a separate pecuniary award.

[284] A loss of housekeeping capacity can be compensated by a pecuniary or non-pecuniary award: *McTavish v. MacGillivray,* 2000 BCCA 164 at para. 73

[285] The Court of Appeal provided guidance on whether a separate pecuniary award for loss of capacity should be made in *McKee v. Hicks*, 2023 BCCA 109:

> [112] To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.

See also *Kim v. Lin*, 2018 BCCA 77 at para. 33.

[286] Whether a court chooses a distinct award or one that is included in the general non-pecuniary award, it is important to value the award with an eye to the differing rationales behind them: *Kim* at para. 34.

[287] The defendant points to the evidence that Mr. Ranseth told Dr. Chow he could do all housekeeping albeit with pain, in support of its argument that the proper approach is to account for this pain in non-pecuniary damages rather than as a separate pecuniary award.

[288] However, this statement was not put to Mr. Ranseth on cross-examination, and it does not accord with Mr. Ranseth's evidence or the independent occupational therapy assessments done by Ms. Abtahi and Ms. Lane of Mr. Ranseth's capacity to do household work. The preponderance of the evidence is that there is a range of household work that Mr. Ranseth simply cannot do, rather than can do but with pain.

[289] I describe Ms. Abtahi's testimony about her November 2023 assessment of Mr. Ranseth above.

[290] Ms. Lane assessed Mr. Ranseth in February 2024 and provided an expert report. Ms. Lane assessed Mr. Ranseth's capacity for activities of daily living in the home, including housekeeping and home maintenance and concluded:

a) Mr. Ranseth is able to complete personal care tasks with modification and pain, and does not require professional assistance for this.

b) Mr. Ranseth is able to complete meal preparation for himself with pain and increased symptoms, and does not require professional assistance for this.

c) Mr. Ranseth is able to walk slowly indoors and outdoors with pain.

d) Mr. Ranseth is able to complete lightweight grocery shopping tasks independently, and does not require paid or professional assistance with this.

e) Mr. Ranseth is able, with his sit-down lawnmower, to complete lawn care tasks at his rental property, and does not need professional assistance with this.

f) Mr. Ranseth is struggling to complete interior household cleaning tasks and does need professional assistance with this.

g) Mr. Ranseth does rely upon others for property maintenance tasks that he cannot perform, and does need professional assistance with property maintenance tasks.

[291] In my view, the evidence supports finding that Mr. Ranseth is unable to do much of the household and outdoor maintenance tasks he previously did. His back pain, and his related inability to stand, walk, bend and lift are by far the dominant causes of this loss of capacity. This indicates that a pecuniary award for this loss of capacity is appropriate as set out in *McKee*. Compensation for replacement services will be addressed separately.

[292] In my view there is a real and substantial possibility that Mr. Ranseth will continue to have these needs in the future. This is a high likelihood.

[293] The defendant says only that because Ms. Lane observed Mr. Ranseth to have shoulder and neck pain in addition to his back pain while doing some household tasks that, Ms. Lane's "recommendations for housekeeping assistance as a result carry little weight." With respect, I cannot agree. This argument fails to address the fact that a substantial basis for Ms. Lane's recommendation is the back pain that does result from the MVA.

[294] I accept, as the plaintiff argues, that given Mr. Ranseth can perform some household duties, albeit with pain, it is appropriate to assess his capacity to perform household duties as being reduced by 50%.

[295] Ms. Clark's report provides the information upon which to calculate this pecuniary loss.

[296] Ms. Clark starts with the average time use of Canadian males, which data shows on average employed males living alone without children spend 2.1 hours a day on household work. Applying a replacement cost basis using Statistic Canada's

1995 study of households' unpaid work, (based on a 1992 replacement cost of $10.60, brought forward annually for general wage inflation) to determine the value of that household work would lead to an award of $87,934 for pre-trial capacity losses, and $586,398 to the end of his life, if Mr. Ranseth had suffered a full loss of household work capacity.

[297] However, based on the evidence at trial, I am not persuaded that the average of 2.1 hours of household work a day is the appropriate estimate for Mr. Ranseth. Ms. Wylie testified that she would spend roughly 12 hours every month or so to try to get Mr. Ranseth's house "manageable and clean for him." This amounts to about 0.4 hours a day on average. That said, the evidence was that Mr. Ranseth would not, but for the accident, choose to let his home get as messy and dirty as Ms. Wylie finds it each trip—as she put it, Mr. Ranseth used to take pride in his living space. Accordingly, I find Mr. Ranseth would spend at least twice as much time as Ms. Wylie has been dedicating to his housekeeping. When I consider too the evidence of the additional time Mr. King puts in to help Mr. Ranseth with his outdoor maintenance tasks, I am of the view that an average of an hour a day on housekeeping tasks is an appropriate estimate of the amount of time Mr. Ranseth would have spent on this in a without-accident scenario.

[298] Accordingly, applying a 50% loss of capacity to a one hour a day without-accident scenario results in a pecuniary award of $20,923 for pre-trial loss of household capacity.

[299] For future loss of household capacity, I would apply an increase to the hours that would have been spent in a without-accident scenario. This is to recognize the statistics that Canadian males spend more time on average on household tasks after retirement, up to the age of 80, as Ms. Clark's report demonstrates. I would apply an increase to Mr. Ranseth's without-accident future that is proportionate to the Canadian averages presented by Ms. Clark, using the one hour a day baseline up to the age of 70. This results in the proportionate increase to Mr. Ranseth's hours of 1.6 hours per day from the age of 70-75 and 1.4 hours per day from 75-80. As set

out in Ms. Clark's report, this leads a present value pecuniary award of $121,789 for the period from trial to age 80 for loss of housekeeping capacity.

Professional Assistance

[300] Ms. Lane's report says at page 3:

> Recommendations are meant to assist with maintaining Mr. Ranseth's function and medical stability, maximizing his level of independence where possible, and providing assistance with activities he is no longer capable of performing.

[301] Ms. Lane recommends the following assistance:

a) two hours of housecleaning per a week;

b) 19 hours of home maintenance per year, based on 50% of the American Time Use Survey's estimate of 0.08 hours a day being spent by men over the age of 15 on of each interior home maintenance and exterior home maintenance; and

c) a portable dishwasher.

[302] In my view, the costs for replacement professional assistance services, as well as the portable dishwasher, should be compensated. Ms. Clark's hour estimates are reasonable.

[303] The above are included in costs of future care in Ms. Clark's report.

Costs of Future Care

[304] The plaintiff is entitled to compensation for the costs of future care based on what is medically necessary to restore the plaintiff to a position as though the accident had not occurred. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the available medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v.*

Bartsch, 49 B.C.L.R. (2d) 33, 1985 CanLII 179 (S.C.); *Quigley v. Cymbalisty*, 2021 BCCA 33 at para. 43.

[305] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence, and it must be fair to both parties: *Pang v. Nowakowski*, 2021 BCCA 478 at para. 58. For an award of future care: (1) there must be a medical justification for claims for cost of future care; and, (2) the claims must be reasonable: *Milina* at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62–63; *McGuigan Estate v. Pevach*, 2024 BCCA 106 at para. 92 citing *Paur v. Providence Health Care,* 2017 BCCA 161 at para. 109. Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff.

[306] An award of damages for costs of future care is partly prediction and prophecy: *Pang* at para. 58. In *Pang* at para. 57, Justice Voith identified three additional considerations of which the court must be satisfied in this analysis: first, that the plaintiff would, in fact, make use of the particular care item; second, 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; and, third, that there is no significant overlap in the various care items sought.

[307] It is not necessary that a medical expert testify to the medical necessity of each and every item of care that is claimed: *Paur* at para. 109.

[308] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

[309] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *Pang* at para. 58.

[310] I accept that the following expert recommendations for future treatment for Mr. Ranseth's injuries:

Botox treatments

[311] Dr. Cameron recommended Mr. Ranseth receive local botulinum toxin ("botox") injection therapy for the severe muscle spasm involving his right thoracic and lumbar paraspinal muscles. On cross-examination, it was put to Dr. Cameron that determining Mr. Ranseth's candidacy for botox was contingent upon a physiatrist assessment. Notably, Dr. Chow did not in his expert report recommend botox injections for Mr. Ranseth's low back pain, but did recommend a facet block. However, on cross-examination, Dr. Cameron was firm in his evidence that as a neurologist who has been assessing and administering botox for over 30 years for muscular and neurological issues, it was his opinion that Mr. Ranseth is a candidate for botox on a trial basis. He warned that given that Mr. Ranseth is more than two years beyond his date of injury, botox would not likely provide a degree of improvement that would allow Mr. Ranseth to return to work, but may provide some relief. He testified it was "worth a try" given the level of pain and impairment Mr. Ranseth has been living with, and he "might be able to have some improvement."

[312] Based on Dr. Cameron's assessment and opinion, there is a real and substantial possibility that botox will provide Mr. Ranseth some relief from pain and impairment; however, I find the relative likelihood of this to be fairly low. I would accordingly apply a negative contingency and reduce by 80% the costs of future botox treatments set out in Ms. Lane's and Ms. Clark's evidence, allowing for a present value award of $4,700.

Medications

[313] I accept the recommendations for medications to manage pain symptoms as follows: Tylenol, as recommended by Drs. Chow and Cameron, on a twice-per-day basis through to the age of 90, for a present value award of $1,716 plus $86 for the present value of the GST and PST Ms. Clark assumed applied. I also accept Dr. Ganesan's recommendation for a trial of a combination of Fetzima and Brexpiprazole. Based on the uncertainty of the effectiveness of the medication combination, Dr. Ganesan recommended a trial. The plaintiff has advanced its economic evidence on the basis only of a one-time three-month trial of each. In my view, this is a reasonable and conservative approach to projecting the future cost of these medications. I would allow these expenses on the basis set out in Ms. Lane and Ms. Clark's reports at a present value of $769 for both.

Occupational Therapy

[314] Mr. Ranseth continues to try to find routines and habits that will reduce his pain and allow him to function at the highest level he can. Dr. Chow recommends occupational therapy that will allow Mr. Ranseth to learn a mindfulness program for pain control and to limit sleep disturbance, as well as therapy that will teach Mr. Ranseth about biomechanics and techniques for energy conservation and pain management. I accept these recommendations are appropriate on a one-time basis, allowing for 40 sessions. I would award compensation for these expenses on the basis set out in Ms. Lane and Ms. Clark's reports at a present value of $4,984.

Psychology Sessions

[315] Dr. Ganesan was express in recommending cognitive behavioural sessions for Mr. Ranseth as distinct from psychoanalytic type counselling, stating "[h]e is a practical person and will want to see the results." This recommendation is to address the depression and symptoms of anxiety discussed earlier. I accept this recommendation is appropriate for Mr. Ranseth, and I accept Ms. Lane's determination that 20-30 sessions is an appropriate estimate upon which to assess costs of future care given Dr. Ganesan's recommendation, although more follow up

may be required. I would award a present value of $4,450 for this future care expense as set out in Ms. Clark's report.

Physiotherapy

[316] I am of the view that it is appropriate to compensate for the cost of future physiotherapy, as recommended by Dr. Chow. Dr. Chow testified that the physiotherapist will need to be familiar with myofascial pain syndrome so as to be able to treat with intramuscular stimulation followed by manual therapy and stretching and strengthening of trigger point muscles. I accept the estimate of six to 12 sessions a year to age 90 is appropriate.

[317] I am not, however, of the view that an award should be made for the cost of physiotherapy associated with vestibular therapy as recommended by Dr. Ganesan, as no causal link between this symptom and the MVA was established. I would deduct this one-time cost from the values calculated by Ms. Lane and Ms. Clark.

[318] For the same reason, I do not accept the claim for a one-time expense for visual therapy as recommended by Dr. Ganesan. No causal link between any visual symptom and the MVA was established. I would deduct this one-time cost from the values calculated by Ms. Lane and Ms. Clark.

[319] I would award a total of $14,259 for the present value of the costs of future physiotherapy as set out in Ms. Clark's report.

Kinesiology and physiotherapy

[320] Dr. Chow explained in testimony that in addition to physiotherapy, Mr. Ranseth will require professional assistance from a kinesiologist, as an exercise specialist. Physiotherapy sessions will tend to be shorter and focus on passive treatments and strengthening trigger points. Kinesiologists complement that with more active treatment and by assisting patients in completing guided exercises. I accept the recommendation that Mr. Ranseth will require kinesiology in addition to physiotherapy, and I accept that an initial program of 20-24 sessions with four to six sessions a year thereafter to age 90 to review and manage the program and

Mr. Ranseth's long-term functioning is appropriate. I would allow these expenses on the basis set out in Ms. Lane and Ms. Clark's reports, allowing present value awards of $1,740 plus $87 for tax for the initial sessions and $8,844 plus $442 in tax for the long term sessions.

Housekeeping

[321] I have already explained that I accept Ms. Lane's recommendations for future assistance for Mr. Ranseth to complete housekeeping and outdoor maintenance tasks as follows:

a) housecleaning services for two hours per week until Mr. Ranseth is 75 years old, at which point the time per week is to decrease by 20% per year and end when Mr. Ranseth is 80 years old; and

b) interior and exterior home maintenance services for 19 hours annually until Mr. Ranseth is 75 years old, at which point the time per year is to decrease by 20% per year and end when Mr. Ranseth is 80 years old.

[322] Accordingly, I order a present value award of $89,873 plus a $4,493 allowance for taxes as set out in Ms. Clark's report for housecleaning services. I also order a present value award of $28,258 plus a $1,413 allowance for taxes as set out in Ms. Clark's report for interior and exterior home maintenance services.

[323] I also accept that given his back pain when trying to stand to do dishes, Mr. Ranseth requires a portable dishwasher, as recommended by Ms. Lane. I would award $593 plus $71 for this expense.

Summary

[324] Ms. Lane provided range estimates for frequency and cost for several of the recommended treatments. Ms. Clark, in turn, produced two tables of present values for costs of future care based on Ms. Lane's report: one based on the lowest costs in Ms. Lane's report and the least frequent replacements, and one based on the highest costs and highest frequency replacement.

[325] Given that the experts in this case do not expect significant improvement for Mr. Ranseth from the recommended treatments, and that Mr. Ranseth has demonstrated a very practical approach to care—willing to accept it when beneficial, but not inclined to spend more time than necessary on treatments that are not proving beneficial—I am of the view that it is very likely Mr. Ranseth will proceed with the lower frequency instances of care. Further, I was provided no evidence on which to base a finding that Mr. Ranseth's costs of care would be more than the lowest expected expense. Accordingly, I find it is appropriate to base the award for cost of future care on Ms. Clark's table 6-A, minus those treatments for which I would not make an award, and minus the contingency associated with the lower likelihood of success for botox treatment.

[326] In the result, I would award Mr. Ranseth $166,782 for the costs of future care and housekeeping assistance.

Special Damages

[327] Special damages are agreed between the parties to be $636.15.

Summary

[328] In summary, damages are awarded as follows:

Non-Pecuniary General Damages	$190,000
Past Loss of Earning Capacity	$245,508 (+ Prejudgment Interest)
Future Loss of Earning Capacity	$1,685,086
Past Impaired Housekeeping Capacity	$20,923 (+ Prejudgment Interest)
Future Impaired Housekeeping Capacity	$121,789
Cost of Future Care and Housekeeping	$166,782

Special Damages	$636.15 (+ Prejudgment Interest)
Total	$2,430,724

Costs

[329] Should the parties be unable to agree on any adjustments to the award, whether in respect of income tax and employment insurance premiums on past loss of earning capacity, tax gross up on the cost of future care, or deductions mandated by the provisions of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, they may apply for a determination.

[330] If anything occurred between the parties that might affect any award of costs in this case and that cannot be settled between them, the parties may apply for a hearing to address costs. Otherwise, costs will follow the event and are awarded to the plaintiff to be assessed on Scale B of Appendix B of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

"Giltrow J."