IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cross v. Peaker,*
2025 BCSC 344

Date: 20250303
Docket: M203276
Registry: Victoria

Between:

Kent Christopher Cross

Plaintiff

And

Steven Matthew Peaker

Defendant

Before: The Honourable Justice Matthews

Reasons for Judgment

Counsel for the Plaintiff:	M.S. Cho R. Kalsi
Counsel for the Defendant:	M.A. MacKenzie
Place and Dates of Trial:	Victoria, B.C. September 10-13, 16-20, 2024
Place and Date of Judgment:	Victoria, B.C. March 3, 2025

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Overview

[1] Kent Cross claims damages for injuries that he suffered in a motor vehicle accident on October 11, 2028. He was driving home from work as an industrial painter for Seaspan at the Victoria Shipyards and was struck from behind by a vehicle driven by the defendant, Steven Matthew Peaker. Mr. Cross asserts that he has injuries to his neck, left shoulder, upper back, lower back, hips and he has chronic headaches and migraines caused by the accident. He testified that he has had pain at some level and in some parts of his body most days since the accident. He testified that his mood has deteriorated, he is irritable, finds it difficult to sleep, and is not the worker, husband or father he planned to be.

[2] Part way through trial, Mr. Peaker admitted liability for the accident. Mr. Peaker does not dispute that Mr. Cross suffered whiplash associated disorder and muscular strain to his neck, upper back, left shoulder and lower back in the accident. Mr. Peaker submits that Mr. Cross has had a near complete recovery and likely will have a complete recovery. Mr. Peaker asserts that Mr. Cross' evidence about ongoing difficulties due to his accident injuries cannot be accepted because his evidence is not reliable.

[3] The most contentious issues are the nature and extent of Mr. Cross' ongoing injuries, whether his headaches and migraines are accident injuries, and whether his accident injuries are limiting him at work and in other aspects of his life.

[4] Despite the concerns raised by the defence about Mr. Cross' evidence, the evidence readily demonstrates that, six years after the accident, Mr. Cross remains compromised in his work and non-work activities due to accident injuries.

Credibility and Reliability

[5] Mr. Peaker submits that there are issues with Mr. Cross' evidence such that I should approach all of his evidence with caution and I should not accept his uncorroborated assertions of his current level of pain and limitations.

[6] A personal injury plaintiff bears the burden of proof and may discharge the burden through the plaintiff's own evidence, so long as the court is careful to scrutinize the evidence when there is no objective evidence available: *Butler v. Blaylock,* [1983] B.C.J. 1490, [1983] B.C.W.L.D. 609 (C.A.) at para. 13. Where the plaintiff has tendered expert evidence about his or her claim for damages, 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 and is uncorroborated, 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.

[7] When evaluating evidence, the court often considers two components: credibility, also described as veracity; and reliability, which is sometimes also described as accuracy. It is not unusual to see credibility and reliability referred to together as credibility, but they are distinct: *R. v. Morrissey* (1995), 22 O.R. (3d) 514, 1995 CanLII 3498 (C.A.) at para. 33

[8] Evaluating credibility and reliability involves examining the witness' evidence for the ability and opportunity to observe events, the firmness of memory, whether the witness appears able to resist the interests at play to modify his or her recollection, a comparison of the evidence against independent evidence, whether the witness changes evidence during direct examination and cross-examination, any motive to lie, and demeanour. If the trier of fact accepts the witness's evidence as being generally credible, then the trier of fact should compare it with the other evidence to determine whether it fits within the reasonable preponderance of probabilities given the circumstances: *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186–187, aff'd 2012 BCCA 296.

[9] Generally, I considered Mr. Cross' evidence to be credible in the sense that I formed the impression that he was trying to be truthful. He resisted the temptation to overstate evidence in his favour. For example, he testified that after the accident, he had severe low back pain and pain in his hips that affected his ability to walk his dog. He did not testify that his hips caused him problems when he commenced his

gradual return to work in February 2019 or subsequently, a sign that he was carefully assessing his injuries and only reporting problems with those that persist.

[10] Mr. Cross testified that at present, his low back problems are infrequent. Again this evidence is consistent with an attempt to avoid exaggeration or overstatement. Similarly, he agreed that he told the defendant's orthopedic surgeon, Dr. Leith, that his left shoulder is 80% back to normal for mobility, but he still has nagging pain. As I will address, Dr. Leith ignored what Mr. Cross told him, and what Dr. Leith made a note about, regarding pain. That is a problem with Dr. Leith's evidence, not Mr. Cross' evidence.

[11] Mr. Peaker submits that Mr. Cross' evidence about a flare up of symptoms and lower back spasms after he had a functional capacity evaluation raised veracity and reliability concerns. The occupational therapist who conducted the functional capacity evaluation, Ms. Szarkiewicz, testified that she asked Mr. Cross to follow up with her after the functional capacity evaluation so she could understand how the assessment affected his symptomatology. She testified that Mr. Cross did not do so, but she followed up with him some time later. She recorded that he told her that his back went into spasm after the functional capacity evaluation and was flared up for weeks, he took a week off work, and he was prescribed anti-inflammatory medicine. On that basis, Ms. Szarkiewicz concluded that Mr. Cross' participation in the functional capacity evaluation caused a low back flare up and back spasms.

[12] Mr. Cross testified that he told Ms. Szarkiewicz that his back flared up after the functional capacity evaluation and when he went back to work, it got worse and his back went into spasm and that is when he took time off work, but he did not tell her that he took a week off. He testified that he did not tell Ms. Szarkiewicz when the spasms and time off work occurred, except to say generally that it was when he went back to work. He testified that he believed he initially worked on light duties and then about a week later, he was assigned work that involved tight spaces and a hunched over position during which his back got worse and the spasms started.

[13] Mr. Cross asserts there is no substantive difference in the testimony of Mr. Cross and Ms. Szarkiewicz about whether he had a back pain flare up that he associated with the functional capacity evaluation. I agree.

[14] However, there is a problem with the timing of when he was off work which also raises a question as to whether the functional capacity evaluation was the cause of the flare up and/or spasms that caused him to be off work. The functional capacity evaluation was on April 11, 2024. According to Mr. Cross' work records, he had time off work in late April and in the second half of May 2024. On cross examination, the import of Mr. Cross' evidence was that he took time off work about one or two weeks after the functional capacity evaluation, but as he was taken to various notes of medical practitioners and his work attendance records, he revised his evidence such that the time off work was likely in the second half of May 2024.

[15] Nevertheless, and fairly, on cross examination, counsel for Mr. Peaker also brought to Mr. Cross' attention that on April 16, 2024, he told his physiotherapist that his back was aching more after he had the functional capacity evaluation. In addition, Ms. Bowles testified that Mr. Cross was in pain when he returned home from the functional capacity evaluation.

[16] The medical records show that Mr. Cross saw his doctor on May 23, 2024 about back spasms and received a prescription for anti-inflammatories. Physiotherapy notes from May 28, 2024 include that Mr. Cross said he had to take time off work due to back spasms. Mr. Cross' doctor and his physiotherapist also made notes relating the back spasms to gym workouts. Mr. Cross testified that he told his doctor about working in a confined area, and he told his doctor and his physiotherapist about a gym workout involving dead lifts, and that they may have speculated that the gym workout caused the back spasms, but he did not say that.

[17] Having heard and considered all of the evidence, I conclude that Mr. Cross was trying to be truthful but was inaccurate when he testified about what he experienced in terms of back flare ups and spasms after the functional capacity evaluation and the timing of them. His recollection of the closeness in timing, or at

least the impression Ms. Szarkiewicz formed, was that the flare ups, the spasms and the time off work was all very close in time to the functional capacity evaluation. He agreed that the time off work was probably in the third week of May given the records, but he maintained that he had a flare up after the functional capacity evaluation and it was when he had to do the duties that involved hunching in a tight space that the spasms occurred.

[18] I conclude that Mr. Cross was not deliberately being inaccurate about when he took time off work and saw his doctor. Nevertheless, he was inaccurate, and this affected Ms. Szarkiewicz's opinion.

[19] However, this issue does not cause me to believe that Mr. Cross generally overstated his evidence, was not truthful about the impact of his injuries on his functioning, or that his evidence is generally unreliable. Indeed, this issue demonstrates that Mr. Cross was not concocting a flare up for the purpose of the litigation or intentionally exaggerating: despite that Ms. Szarkiewicz asked him to follow up about symptoms and he knew her report was to be used in support of his claim, he did not call Ms. Szarkiewicz to report the flare up and thereby establish an evidentiary record for her report. He told his physiotherapist a few days after the functional capacity evaluation that he was having a flare up due to the functional capacity evaluation. His physiotherapist was not providing evidence to support his claim. This behaviour is inconsistent with fabrication of the back flare up.

[20] In addition, Mr. Cross' witnesses paint a picture of a pre-accident physically active, enthusiastic person who, post accident, is different. Post -accident he works, engages in physical rehabilitation, but is limited in many home and recreational activities, and he is no longer an optimistic go to guy at work.

[21] For these reasons, I generally accept Mr. Cross' evidence but I will approach his evidence carefully on matters where accurate recollection of timing is important.

[22] In these reasons, when I state factual matters without qualification, the facts are not in dispute. If the facts are dispute, I will set out the competing evidence and state what facts I have found.

Mr. Cross' Pre-Accident Health, Vocation, Social and Recreational Pursuits

[23] Mr. Cross grew up in Shirley, British Columbia on an acreage with his parents and two older sisters. Mr. Cross' father was an industrial painter. Mr. Cross' father worked nights for Seaspan and ran his own painting company during the day. Mr. Cross testified that he did not get to spend a lot of time with his father because he worked so much, but he did go to Seaspan on Seaspan family days and Mr. Cross sometimes went to work with his father at his father's own business. Mr. Cross testified that he aspired to become an industrial painter like his father.

[24] Mr. Cross' mother, Heather Cross, also worked long hours as a flood technician and then a manager for a fire and flood restoration company.

[25] Mr. Cross testified that he was not strong in academics at high school. He testified that he excelled in hands on schoolwork like woodworking, physical education and cooking.

[26] Mr. Cross testified that while in high school, he played football. He also coached football for younger kids. Mr. Cross testified that he continued playing football after high school, including for a Canadian Junior League team.

[27] In 2010, when Mr. Cross was 16 years old, his father passed away. Mr. Cross testified that at this time, he believed he needed to step up to take care of his family. Mr. Cross testified that over time, his father's loss did not affect him other than to make him try to take every opportunity that life has to offer.

[28] Mr. Cross graduated from high school in 2012 and continued to live with his mother on the acreage in Shirley. After his father's death, he took on outdoor maintenance chores including maintaining the driveway, maintaining trees on the property including fallen trees, maintaining the well and the cisterns on the property.

Heather Cross, Mr. Cross' mother testified that Mr. Cross also cleaned up after himself inside and that when she was disabled due to a pinched nerve around 2016, Mr. Cross took care of all household duties and meal preparation activities.

[29] Mr. Cross testified that after high school, he worked on construction including carpentry, framing, at stone masonry and as a sealant coating specialist. He testified those were all physical jobs and he had no difficulty with them. Mr. Cross testified that he wanted work that was outside and hands-on work.

[30] Mr. Cross' oldest sister became an apprentice industrial painter with Seaspan. Mr. Cross had a summer job at Seaspan when he was in grade 9. Mr. Cross testified that he had a dream of working as an industrial painter with Seaspan, which he described as being like "winning the lotto" because it pays extremely well and allows for retirement at age 65 with a pension.

[31] In 2015, Mr. Cross applied for and obtained a job as an apprentice industrial painter at Seaspan. Mr. Cross testified that the apprenticeship program involved three years of schooling and hands on work experience. Mr. Cross testified that he struggled with the schooling aspects but did well with the hands on work. Mr. Cross testified while in his apprenticeship, he lost the tip of his right index finger while working on his car. He testified that ended his football, but he was able to continue with his apprenticeship. By the time of the accident, Mr. Cross had passed the industrial painter Red Seal exam but still had more hours to achieve his journeyman status in accordance with Seaspan's elevated requirements.

[32] Mr. Cross met Melissa Bowles, now his wife, in May of 2018 at Seaspan, when she was working as an apprentice industrial painter. Ms. Bowles testified that shortly after they met, they started talking about starting a life together, including buying a house and having two or more children. Mr. Cross testified that at that time, he was living with his mother and working as much overtime at Seaspan as he could so that he could afford to buy his own home.

[33] Mr. Cross testified that prior to the accident he liked to hunt with a crossbow, surf, snowboard, and hike. Mr. Cross testified that after his football career ended, he maintained his physical fitness by working out with weights and doing a lot of cardio exercise. He coached youth football. Ms. Bowles testified that she and Mr. Cross engaged in recreational activities together including bicycle riding and hiking. She testified that Mr. Cross would long board while she roller bladed.

[34] Mr. Cross and Ms. Bowles moved to Duncan together into a house that they purchased together in the summer of 2021. They have a son, K.J., who was born in September 2021. They were married in June 2023.

The Accident and Mr. Cross' Injuries

[35] During the trial, Mr. Peaker admitted liability for the accident that occurred when Mr. Peaker was driving a vehicle travelling behind Mr. Cross and rear-ended Mr. Cross' vehicle while Mr. Cross was stopped at a red light. Mr. Cross testified that he felt his head thrown back and forward and felt his head strike the headrest during the collision. He testified that he felt tightness in his neck, shoulders, hips and low back shortly after the accident and when he arrived home, he had difficulty taking his dog for a walk due to the pain.

[36] Mr. Cross went to work the next day, but he was so uncomfortable that he left work early and went to a walk in clinic. He was diagnosed with a thoracic spasm. He worked 1.75 hours on October 17, 2018 but did not work for the rest of 2018.

[37] Ms. Bowles described Mr. Cross as hunched over, in pain and looking sad in the weeks immediately following the accident. Ms. Cross testified that he often withdrew into his room during this period.

[38] Mr. Cross testified that his mother was putting her house on the market and he agreed to do some work on it to prepare for sale including replacing a deck and refinishing floors. He testified he had the skills to do these things because he had worked as a carpenter. He testified he was not able and eventually his mother hired

people to do the work. Ms. Cross testified that Mr. Cross inability to do the yard work and household repairs was a source of frustration for both of them.

[39] Mr. Cross testified that he did not like being off work because he preferred to be active and he needed to make money. He testified that employment insurance and money he received from ICBC were not enough to make his truck payments and the rent he was paying to his mother. He testified that he started eating less because his bills were piling up and he could not afford food.

[40] On January 3, 2019, Mr. Cross passed out, struck his head and loss consciousness. The parties agree that this was a “suspected vaso-vagal episode”. Mr. Cross testified that he had a CT scan after the fall and was told by his doctor that it was normal. Mr. Cross believes he did not suffer a concussion during that fall.

[41] Mr. Cross attributes his vaso-vagal episode to weight loss, based on what he understands his doctor told him. There is no medical or first hand evidence linking the vaso-vagal episode to accident-connected weight loss, and so I will not consider the episode as an accident-related injury.

[42] Mr. Cross commenced a gradual return to work in February 2019 and returned to full time duties in November 2019. Mr. Cross testified that over the return to work and up until the present, he finds that repetitive tasks, especially when he is working with his arms overhead, hunched over, or in confined spaces, cause pain and difficulty for him, especially in his shoulder, upper back and neck. He testified that he often ends a shift with a headache brought on by the pain in his neck and he takes medication to try to control the headaches and prevent them becoming migraines. Co-workers describe him as slower than in the past, frustrated with himself, and short tempered with co-workers.

[43] Mr. Cross testified that his coping mechanisms include taking banked days or vacation days to break up blocks of shifts to give his body a break. He testified that he also asks co-workers for assistance, or requests tasks that are “light tasks” that do not require overhead work or heavy power tools.

[44] Mr. Cross was laid off from Seaspan in November 2020 due to lack of work attributable to the COVID-19 pandemic. He found replacement work, but it was more sporadic and did not pay as well. He testified that the more sporadic work allowed him to rest between jobs and it was easier to cope with his injuries and work.

[45] Mr. Cross' was called back to work at Seaspan in December 2021. He testified that he went back, including to working overtime, because he needed the money. He and Ms. Bowles had a son in September 2021 and Mr. Cross had become the sole income earner for the family.

Injuries

[46] In addition to Mr. Cross, Ms. Bowles, Ms. Cross, Mr. Cross' step father-in-law, Paul Cozens, and co-workers Andre Lauzon and John Evans, testified about their observations of Mr. Cross before and after the accident and so provided information about how his injuries appear to affect him.

[47] Mr. Cross testified that due to his immediate post accident symptoms, he saw his family doctor who recommended physiotherapy, kinesiology and massage therapy. Mr. Cross testified that he followed all of these recommendations.

[48] The parties agree that Mr. Cross commenced physiotherapy treatments on October 18, 2018, and has had physiotherapy from three different providers up to the time of trial. Mr. Cross testified that initially he went three times a week for intra-muscular-stimulation ("IMS") treatments, and then went less as he had improvement. He testified that the physiotherapy slowly helped his posture, improved his ability to walk, and his mobility generally. He testified that the physiotherapy has not been able to eliminate all of his symptoms, including a nagging pain and soreness in his left shoulder, pain in his neck and pain in his low back.

[49] Mr. Cross testified that he attended massage therapy for treatment on his low back, mid back, shoulders and neck. He testified that he found it helpful at the beginning. He testified that as time went on, he did not find it as helpful as

physiotherapy because his muscles seemed to respond better to IMS treatments than to massage treatment.

[50] Mr. Cross testified that he worked with a kinesiologist starting in January 2019. Mr. Cross testified they worked on trying to strengthen his shoulder girdle but he had to reduce weights on his left side compared to his right.

[51] Mr. Cross testified that his doctor recommended over the counter pain medication such as Advil. He testified he took it to help keep the level of the pain down during the day but it did not eliminate the pain. He testified that in 2023, he started taking amitriptyline for tension and pain. He finds it effective, especially with regard to headaches.

[52] Mr. Cross has attended over 85 physiotherapy and/or massage therapy sessions; 125 physiotherapy sessions; and 37 kinesiology sessions. Mr. Cross testified that he continues to attend kinesiology and physiotherapy.

[53] Mr. Cross saw Dr. Hawkeswood, a physical medicine rehabilitation specialist, and Dr. Leith, an orthopedic surgeon, for independent medical examinations.

[54] Dr. Hawkeswood was qualified to give opinion evidence on physical medicine and rehabilitation, including on musculo-skeletal injuries, headaches and non surgical interventions. Dr. Hawkeswood diagnosed whiplash-associated disorder affecting Mr. Cross' cervical, thoracic and lumbar spine. He opined that Mr. Cross has post traumatic neck pain perpetuated by facet joint irritation and myofascial pain; complex left periscapular pain likely perpetuated by left shoulder dysfunction, referred from his lower cervical spine and potentially perpetuated by spinal scoliosis; complex left shoulder pain with probable inflammation and probable myofascial pain in the left posterior deltoid; and relatively mild mechanical low back pain.

[55] Dr. Leith is an orthopedic surgeon who primarily treats patients who have problems with the upper extremities, hips and knees. He was qualified to give evidence on the assessment, diagnosis, management and repair of disorders in the musculo-skeletal system, with expertise in the assessment, diagnosis and repair of

shoulder disorders. Dr. Leith opined that Mr. Cross suffered a whiplash associated disorder and muscular strain affecting his neck, upper back and lower back. He testified that this diagnosis includes left shoulder girdle soft tissue symptoms.

Neck

[56] Mr. Cross testified that when he was off work, and receiving physiotherapy, his neck pain improved to the point where he described it as nagging pain.

[57] Mr. Cross testified that when he commenced his gradual return to work in February 2019, his neck pain and mobility was aggravated by work. He testified that since his return to work at Seaspan in December 2021 after the COVID-19 layoff, his neck has been getting tighter and tighter.

[58] Dr. Hawkeswood opined that Mr. Cross' neck pain is perpetuated by facet joint irritation. He explained that a facet joint is used for movement and weight bearing in the neck which is a common source of pain after a trauma. I accept this evidence, which was not controverted. In addition, Dr. Hawkeswood connects Mr. Cross' neck pain with his headaches and migraines. This aspect of his evidence is controversial. I will address it below.

Left Shoulder and Upper Back

[59] Mr. Cross testified that he had pain between his shoulder blades in the days immediately following the accident. He testified that over time, this has improved. Mr. Cross testified that when he commenced his gradual return to work in February 2019, his left shoulder issues were aggravated by work, especially over head work, when holding the paint bucket in his left hand, and when he does paint work with a roller on a long pole, he experiences strain between his shoulder blades which becomes painful. He testified that he also struggled with left shoulder mobility.

[60] Both Dr. Leith and Dr. Hawkeswood diagnosed whiplash associated disorder to various areas including the upper back. The evolution of this injury as described in the reports and in the evidence is related to the shoulder pain: i.e.: when he

experiences shoulder pain he also experiences pain between his shoulder blades in his upper back.

[61] Mr. Cross was referred for trigger point injections on his left shoulder and underwent injections on 12 occasions. Mr. Cross testified that the injections were painful, but he had improvement in the mobility of his shoulder, including being able to lift his arm past his shoulder. He testified that the benefit lasted for about a week after the injections and then he had to return for another injection. He testified that after a time, he hit a plateau at which he was not having further improvement so he stopped the injections.

[62] In 2021, Mr. Cross had an MRI on his shoulder which showed bursitis and inflammation. He was then referred for prolotherapy injections and he had two. After the first, he felt improvement. After the second, he felt worse. When he told the doctor that, he was referred for another MRI.

[63] Mr. Cross testified that over the last two and a half years, his shoulder pain is a constant nagging pain, at about four to six on a pain scale of zero to ten. He testified that when he works in situations where he has to do a lot of overhead work, repetitive work or work with vibrating tools, he has so much shoulder pain that he struggles to use his left hand on the steering wheel when he drives home. He testified that it can reduce him to tears.

[64] Dr. Hawkeswood found signs of impingement in Mr. Cross's left shoulder, which he explained happens when the structures of the rotator cuff are squeezed causing pain. Dr. Hawkeswood described sub-acromial bursitis as the impingement causing less space and rubbing that causes irritation, causing the bursa sac to become inflamed. He also testified that, based on the clinical records, various practitioners had noted rotator cuff wasting over time, consistent with what he saw on examination. In addition, he opined that tightening in the capsule that he observed must have been going on for a while in order for him to be able to perceive it on a physical examination.

[65] On cross examination, Dr. Hawkeswood testified that when he examined Mr. Cross, the range of motion in his left shoulder was full, but Mr. Cross was slow and uncomfortable when he put his shoulder through the range. On cross examination, Dr. Hawkeswood testified that some of the results of the physical examination were not exclusively subjective. For example, the test called the Neers test, requires both pain and at least some reduction in range compared to forward flexion in order to be positive. Mr. Cross had both and a positive test.

[66] Dr. Hawkeswood explained that Mr. Cross has had two types of medical imaging on his left shoulder. On the first, the radiologist described degeneration, and fluid in his rotator cuff indicative of inflammation. Dr. Hawkeswood testified that the second image showed bursitis which is different from the fluid in the rotator cuff. He explained that bursitis often goes hand in hand with rotator cuff inflammation so those two findings lined up.

[67] Dr. Hawkeswood also opined that a common phenomenon in people with shoulder injuries is that they start using their shoulder differently to avoid the pain or to compensate for the lack of function or mobility, and the different way of using the shoulder then causes other problems such as rotator cuff problems and/or bursitis. He testified that some of his findings of problems with Mr. Cross' shoulder are consistent with this phenomenon.

[68] Dr. Hawkeswood explained that Mr. Cross reported clunking in his shoulder, which Dr. Hawkeswood could not feel during the physical examination, but which caused him to suspect a labral tear so he recommended an arthrogram or a high intensity scan. In his written report, which was completed before the scan was done, Dr. Hawkeswood opined that Mr. Cross had probably suffered a structural injury to his left shoulder, but since the scan, despite that it was not a gold standard arthrogram, he is now of the view that Mr. Cross does not have a structural injury.

[69] Dr. Leith reported that Mr. Cross told him that his shoulder was 80% of normal. Dr. Leith's notes are that Mr. Cross told him that the strength in his shoulder

had improved but he continues to have pain in his shoulder and between his shoulder blades. Mr. Cross agreed that the notes reflect what he told Dr. Leith.

[70] Dr. Leith described that he made findings of pain to palpation to the deltoid and infraspinatus/teres muscle region on the left side as well as the posterior shoulder blade and upper rhomboid/levator muscle on the left side. Dr. Leith did not describe doing tests on shoulder mobility, strength and pain, including tests that Dr. Hawkeswood did such as a Neers test, an empty can test, a Hawkins test or an Obrien's test, all of which were positive or triggered a pain response.

[71] Dr. Leith did not diagnose the cause of the pain he detected in Mr. Cross' shoulder, unless that diagnosis is included in his diagnosis of whiplash associated disorder and muscle strain in his upper back region. In his report, Dr. Leith referred to the shoulder problem as "soft tissue symptoms" without describing what soft tissues and what issues, rendering his report of limited value to assist the court.

[72] Dr. Leith described that "there are no objective measures of any structural injury". When he was testifying, he explained that through his physical examination and history, he could not detect a tear to the rotator cuff or a tear to the labrum.

[73] Dr. Leith also opined that Mr. Cross' pain "should resolve over time" although he did not explain by what method or over what timeframe. At another part of his report, without reference to a particular injury, he thought Mr. Cross had a "good prognosis" since he had "nearly normal levels" and his symptoms "should eventually resolve". Without an explanation otherwise, the description of "nearly normal levels" must be in refence to the 80% of normal for shoulder strength. Again, that statement by Mr. Cross was accompanied by a statement that he has ongoing pain in his shoulder and between his shoulder blades. It therefore appears that in his prognosis, Dr. Leith has blurred Mr. Cross' recovery of shoulder strength with overall recovery, and not accounted for his ongoing pain in his shoulder and between his shoulder blades (and elsewhere).

[74] Dr. Leith also reported that Mr. Cross told him that he had reached a plateau with his shoulder. Dr. Leith does not explain how he expects that Mr. Cross will move beyond the plateau to a state of full recovery in which he will have no continuing symptoms of pain. Dr. Leith saw Mr. Cross over five years after the injury and after extensive and ongoing attempts at rehabilitation and symptom management. Dr. Leith did not address the significance of the difference between 80% of normal and 100% of normal.

[75] On cross examination, Dr. Leith did not agree that Mr. Cross has chronic pain, even in his shoulder, because his pain is treatable. However, in his recommendations he stated that potential treatments have not been proven to be 100% effective and would be “trial-and-error”.

[76] In summary, Dr. Leith’s opinions about Mr. Cross’ shoulder were not well developed or explained, and certainly not in comparison to those of Dr. Hawkeswood. I formed the impression that he cut off the assessment when Mr. Cross told him that his shoulder was 80% of normal, essentially overlooking the pain Mr. Cross experiences in his shoulder and the difference between 80% and 100% of normal for a person who needs his shoulders for his work.

[77] I do not accept Dr. Leith’s opinion that Mr. Cross’ shoulder injury has essentially resolved, or that his ongoing shoulder pain is not disabling and will completely resolve. I accept Dr. Hawkeswood’s opinion that Mr. Cross has impingement and bursitis in his left shoulder that was caused by the accident and is aggravated by using his shoulder differently since the accident. While there are treatments that can be tried, there is not a good chance of further improvement.

Low Back and Hips

[78] Mr. Cross testified that he had pain in his low back and hips after the accident.

[79] Mr. Cross did not testify about pain in his hips after he returned to work in February 2019.

[80] With respect to his low back, Mr. Cross testified that the low back pain improved when he was off work and became intermittent. He testified that after returning to work, he had low back pain from time to time especially when working in tight spaces. He testified that intimate relationships with Ms. Bowles have been disrupted by his low back pain.

[81] As discussed above, Mr. Cross testified that he had a flare up in low back pain, and low back spasms, after he attended the functional capacity evaluation. Ms. Bowles testified that Mr. Cross was complaining of pain when he got home, that he was “pretty much a wreck” and did not do much other than lie on the couch.

[82] Given the evidence I have described above, I conclude that Mr. Cross had a flare up of low back pain that started the same day as the functional capacity evaluation, but it was a few weeks before he developed back spasms and took time off work.

[83] Dr. Hawkeswood testified that when he examined Mr. Cross, he noted that Mr. Cross had discomfort, but not a significant amount of pain, in his low back during certain movements. He noted that Mr. Cross had an incident of low back pain in 2016, which he opined made him more vulnerable to low back pain in the future. He agreed that low back pain is common in the general population, and because Mr. Cross had previous low back pain and was therefore susceptible to low back pain, he is not of the view that the accident injuries are the sole cause of his low back pain. However, given that he had significant low back pain after the accident, Dr. Hawkeswood is of the view that Mr. Cross’ current off and on low back pain is largely, but not entirely, attributable to the accident.

[84] Counsel for Mr. Peaker cross examined Dr. Hawkeswood about his finding of scoliosis in Mr. Cross mid and low spine, and the relationship between scoliosis and back pain. Dr. Hawkeswood testified that back pain among persons with scoliosis is comparable to the general population but persons with scoliosis have a harder time shedding the back pain because it is harder to stretch the spine.

[85] Dr. Leith testified that Mr. Cross indicated that his lower back has recovered. Dr. Leith's notes do not include a note about that. His notes indicate that Mr. Cross said that his low back pain comes and goes.

[86] Dr. Leith both opined that Mr. Cross had no pre-accident health issues relevant to his current issues, and that his current low back pain is the same type of low back pain that Mr. Cross had prior to the accident and that is prevalent in the general population. On this point, his opinions are internally inconsistent about the pre-accident low back pain and Mr. Cross' current state. In addition, Dr. Leith opines that the low back has recovered, attributing that to Mr. Cross, despite that there is no evidence that Mr. Cross actually said that. I do not accept Dr. Leith's opinion.

[87] I conclude that Mr. Cross suffered soft tissue injuries that caused pain in his hips for about three months and then resolved. I conclude that in the accident he suffered injury that caused pain to his low back pain that continues off and on, is aggravated at work from time to time, and was aggravated by the functional capacity evaluation and the kinesiology workout a few weeks after the functional capacity evaluation. I will address causation about his low back pain below.

Headaches

[88] Mr. Cross testified that he started having headaches pretty soon after the accident. He described tension headaches where pain would start in his neck and creep up into his head. He testified that they sometimes turn into migraines if he did not deal with them immediately.

[89] Mr. Cross testified that he did not have headaches that he attributes to the fall during the January 2019 vaso-vagal incident.

[90] Mr. Cross testified that when he commenced his gradual return to work in February 2019, his tension headaches increased in frequency. He testified that as his neck gets tighter, his tension headaches increase. He testified that overhead work can start this process. He testified that some of his tension headaches become

migraines. He testified that one some occasions, he becomes dizzy, nauseous, vomits and has to leave work.

[91] Mr. Cross testified that since he has been taking amitriptyline, his headaches are better. He testified that he can get through a morning at work without a headache, which is a big improvement.

[92] Dr. Hawkeswood testified that Mr. Cross has chronic daily headaches and migraine headaches. Dr. Hawkeswood opined that Mr. Cross' headaches are cervicogenic headaches or possibly occipital headaches. He explained that cervicogenic headaches are headaches that start in the neck and can include migraine features. He explained that there is no clear boundary between cervicogenic headaches and occipital headaches, which involve the sensory occipital nerves that run to the back of the head. Dr. Hawkeswood testified that prior to the accident, Mr. Cross occasionally had bi-temporal headaches, which occur in a different region in his head, and were likely caused by dehydration.

[93] Dr. Hawkeswood testified that Mr. Cross' cervicogenic headaches evolved over time and got worse. Dr. Hawkeswood testified that the evolution of post traumatic headaches can include patients who are non-migrainers becoming migrainers over time.

[94] Dr. Hawkeswood opined that there could be a rebound component to Mr. Cross' headaches, which is when the painkillers, such as Advil, actually cause additional headaches. Dr. Hawkeswood agreed that reducing or ceasing using and replacing it with a prescription medication can offer the chance of reducing or resolving the headaches. He also testified that is not a common approach to treating headaches because the patients are taking the analgesics for the headaches. He testified that Mr. Cross' consumption of over the counter analgesics is not very high and so he is of the view that this would be a low reward strategy in this case.

[95] Dr. Leith testified that Mr. Cross told him that he has migraines that started about a year after the accident. Dr. Leith opined that Mr. Cross' migraines were not

the subject of any clinical entries following the subject accident and, on that basis, he concludes they are not attributable to the accident.

[96] On cross examination, Dr. Leith agreed that Mr. Cross also told him that he struck his head on headrest during the accident, that he told him that he fell in early January 2019, and that the told him that he had headaches prior to the fall. Dr. Leith did not put these facts in his report. On cross examination, he explained that he did not do so because he is an orthopedic surgeon, and those facts are not relevant to musculo-skeletal issues that he was addressing. When asked why he opined about migraines, Dr. Leith answered that he did not have to be a headache or a migraine expert to opine that the timing of the fall and developing migraines was such that they were not caused by the accident

[97] Under further cross examination, Dr. Leith testified that he questions whether Mr. Cross truly has migraines. Dr. Leith agreed that neck pain can cause tension headaches. This would seem to be at odds with his assertion that headaches are not relevant to musculo-skeletal issues. He testified that he suspects that what Mr. Cross experiences at work are actually tension headaches. He testified that they could be the result of a combination of the accident and the fall.

[98] Dr. Leith did not explain why headaches are not within the expertise of an orthopedic surgeon or relevant to musculo-skeletal issues, but migraines are. Without such an explanation, I consider his evidence that headaches are not within his expertise and the scope of his opinions also applies to migraines.

[99] I accept Dr. Hawkeswood evidence on this point as it was careful and considered. Dr. Leith’s evidence is not admissible as not within his expertise, and was internally conflicted.

Mood

[100] Mr. Cross testified that before the accident, he was excited about his future. He loved his work and took pride in being part of a team that undertook the massive task of repainting large vessels. His earnings had allowed him to buy a new truck

and a travel trailer, and he was saving to buy a new house. He was planning a future with Ms. Bowles.

[101] Mr. Cross testified that his optimism about the future has been replaced with frustration and anxiety. He worries about being able to support his family. He finds it increasingly frustrating that his work on rehabilitating his injury is not paying off. At home, he finds that he gets upset easily, especially when his shoulder hurts. He finds that it is hard to find things that make him happy. He testified that he does not like to talk with Ms. Bowles, or anyone, about his injuries because they upset him. He testified that sees a grim future and does not see it getting any better.

[102] Mr. Cross testified that when he was off work, he expected that if he gave it a few months, he would get back to normal. When he went back to work for the gradual return to work, he became very frustrated because his symptoms did not permit him to work the way he want to. He found himself having to ask for help from his colleagues and for easier tasks to do. He felt he was letting the team down and he felt that his colleagues were looking at him as someone who could not get the work done. Mr. Cross described himself as frustrated with himself and short tempered with his colleagues.

[103] Mr. Cross' mother testified that as a young child, Mr. Cross was happy-go-lucky. She testified that as an adult he was often out with friends, going camping and surfing. She perceived that he was enthusiastic about his work at Seaspan because he would come home and tell her what opportunities he had at work. She testified that he was happy, and had a purpose in life.

[104] Ms. Cross testified that after the accident, he was at home for months and seemed frustrated and quiet. She testified that he has become volatile, angry and frustrated. Ms. Cross testified that her son is not the same person and that he is hard to be around sometimes. She testified that it is hard because as his mother, she wants to fix it, but she cannot.

[105] Ms. Bowles testified that prior to the accident, she found Mr. Cross to be a motivated, confident and kind person. She also described him as a firecracker who was sharp as a whip, and who liked to joke around and make light of things. When not working, they would do outdoor activities and go camping. She testified that he was a team player who helped his co-workers. She testified that he had an aura or spirit about him that was more mature than his years.

[106] Ms. Bowles testified that they were planning a life together including having two or more children. She testified that after having one, she knows that having another is not possible because Mr. Cross cannot be the father they expected he would be. She testified that he comes home in pain, tired, grumpy and with no energy to play with their son or help with the evening chores. As a result, Ms. Bowles is frustrated and lonely and the two of them argue.

[107] Joseph Andre Lauzon is an industrial painter senior charge hand at Seaspan who works with Mr. Cross. He testified that before the accident, Mr. Cross was a team player who got along with other workers and supervisors. He testified that after the accident, Mr. Cross' approach as a team player was with Mr. Cross butting heads with others. Mr. Lauzon testified that he and other supervisors perceived that Mr. Cross was trying to push himself to be a valuable team member, and they were trying to get him to slow down because of the obvious difficulties he was having. He testified that this approach has not worked and Mr. Cross has become more and more frustrated and difficult to work with.

[108] John Evans, another co-worker, testified that Mr. Cross has become difficult to work with and is aggressive with co-workers after the accident.

[109] Dr. Hawkeswood opined that he would defer to mental health professionals but he noted issues of concern with regard to Mr. Cross' mental health. A screening tool that he used, which is not diagnostic, noted high levels of anxiety. Dr. Hawkeswood suspected mild depression also. He testified that he believes those issues are playing a role in Mr. Cross' physical symptoms, but are not the root cause

of them. He agreed that if they are appropriately treated he would expect small but meaningful improvement.

[110] Mr. Peaker does not expressly agree that Mr. Cross has mood problems caused by the accident, but he does rely on Dr. Hawkeswood's opinion that if Mr. Cross receives treatment for his mood problems, he will see overall improvement in his symptoms.

[111] Dr. Hawkeswood does not purport to diagnose Mr. Cross with a mental health problem. Mr. Cross relies on *Saadati v. Moorhead*, 2017 SCC 28 at para. 2 in which the Supreme Court of Canada confirmed that the law does not require that compensation for mental injury be based on a recognized psychiatric diagnosis, so long as the threshold for compensation is met, namely, that the defendant's breach caused the injury in fact and in law, citing *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3.

[112] I will deal causation below. At this stage, I conclude that the evidence demonstrates that Mr. Cross has mood issues that cause him to exhibit frustration and anger and to feel defeated. He also is anxious about the present because he feels like he is letting Ms. Bowles down by not pulling his weight at home, by feeling like he is not being the type of father he wanted to be for his son, and because he is not financially supporting his family the way he wanted to. He feels inadequate at work which makes him defensive and causes friction with his co-workers.

Causation

[113] Dr. Leith and Dr. Hawkeswood have given opinions that meet the but-for test, as described below, pertaining to the injuries to Mr. Cross' neck, upper back, and shoulder.

[114] Mr. Peaker disputes that the accident is the cause of Mr. Cross headaches and/or migraines. Mr. Peaker disputes that the accident is the cause of the off and on low back pain that Mr. Cross currently experiences. Mr. Peaker did not articulate a position on causation in relation to Mr. Cross' mood changes.

Legal Principles

[115] In most cases, and in this case, the plaintiff must establish on a balance of probabilities that, but-for the defendant's negligence, the plaintiff would not have suffered the injury. The test recognizes that compensation should only be made where there is a substantial connection between the injury and the defendant's negligent conduct: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21–23; and *Zenone v. Knight*, 2024 BCCA 200 at para. 55.

[116] The defendant's negligence does not have to be the sole cause of the injury so long as it is a necessary cause: *Athey v. Leonati,* [1996] 3 S.C.R. 458 at para. 41, 1996 CanLII 183; and *Emil Anderson Maintenance Co. Ltd. v. Taylor*, 2024 BCCA 156 at para. 130. Causation need not be determined by scientific precision: *Athey* at paras. 13–17; and *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[117] When determining factual causation, it is not important whether the injuries would have occurred in the future regardless of the accident. As long as the accident partially caused the injuries, the defendant is liable. This is the "thin skull" principle, which is that a defendant is fully liable for the unexpectedly severe injuries of the thin skull plaintiff: *Dornan v. Silva*, 2021 BCCA 228 at para. 41. However, the defendant need not compensate for any effects of a pre-existing condition which the plaintiff would have experienced anyway (the "crumbling skull" rule): *Athey* at paras. 32–35.

[118] In sum, to establish causation, the accident must be a necessary cause of Mr. Cross' headaches, migraines, low back issues and mood issues. The accident need not be the sole cause so long as it is a cause beyond a *de minimis* level.

Headaches and Migraines

[119] Mr. Cross described his headaches as starting with neck pain and tension that creeps up into his head. He testified that his headaches started shortly after the accident when he commenced his gradual return to work in February 2019, his tension headaches increased in frequency. He testified that in particular, when he does overhead work, his tension headaches can become migraines. As discussed

above, Dr. Hawkeswood opined these are cervicogenic headaches that have evolved to include features of migraines.

[120] Mr. Peaker's position is that the headaches and migraines are not caused by the accident. Mr. Peaker's argument was not made with reference to the legal principles of causation, but simply that since Mr. Cross did not report headaches or migraines to a physician prior to his January 2019 fall, the accident is not the cause of the headaches or migraines.

[121] Dr. Hawkeswood agreed that in terms of causation, timing is important. He testified that Mr. Cross told him that the headaches started up in the first one to two weeks after the accident. Dr. Hawkeswood also testified that he would expect to see reports of headaches in the time shortly after the accident. He confirmed that the records do not show any specific references to headaches in the first couple of months after the accident which he would understand to mean that the headaches were either mild or not present. However, there is a physiotherapy record one week after the accident that refers to headaches.

[122] Dr. Hawkeswood testified that the clinical records indicate that when Mr. Cross fell in January 2019, he reported that he had worse headaches, which Dr. Hawkeswood took to mean that the he had headaches between the accident in October 2018 and his fall in early 2019.

[123] Dr. Hawkeswood agreed that his opinion in his written report, that the accident bore major material relevance to the headaches, was an overstatement given the lack of references in the clinical records to headaches immediately after the accident. However, he maintained that the accident was materially relevant to Mr. Cross' cervicogenic headaches and evolution to migraines. He testified that cervicogenic headaches are considered an indirect complication of a neck injury and can get worse over time as the neck soft tissues become more irritated and tighten head nerves. Dr. Hawkeswood testified the medical evidence is a good link between the daily headaches and the neck injury.

[124] Dr. Hawkeswood's opinion accords with Mr. Cross' evidence that as his neck gets tighter, his tension headaches increase and can become migraines. The physiotherapy note and the note in relation to the January fall referred to headaches after the accident and prior to the fall, which is evidence that Mr. Cross did not fabricate that evidence. I accept Mr. Cross' evidence that he had headaches after the accident and before the January 2019 fall even though he either did not complain about them to his doctor or his doctor did not make a note.

[125] I do not accept Dr. Leith's opinion that the timing of the onset of migraines rules them out as being caused by the accident. As I said above, his evidence was internally inconsistent and convoluted on whether headaches and migraines are in the scope of his expertise and part of his mandate. In addition, his opinion was thin and simplistic. While simple explanations can be and often are compelling, this opinion was thin and simplistic in the sense of being unsupported by compelling facts or explanation. Dr. Hawkeswood provided a thoughtful and detailed explanation which is clearly within his expertise, makes sense, and accords with the evidence of Mr. Cross.

[126] In closing submissions, counsel for Mr. Peaker described the January 2019 fall as an intervening event, but did not address any caselaw that pertains to when an intervening event breaks the chain of causation. Nor is there any evidence that the January 2019 fall is a cause of Mr. Cross' headaches or migraines.

[127] I accept Dr. Hawkeswood's opinion regarding the relationship between neck pain and headaches, and headaches and migraines, as well as how these injuries and symptoms evolve over time. I conclude that Mr. Cross' headaches and migraines are caused by the accident.

Low Back Pain

[128] Mr. Peaker argues that Mr. Cross' current episodes of low back pain are not caused by the accident but are simply because he has the type of low back pain that is common for the population as a whole. Mr. Peaker did not make this argument

with reference to causation principles, including the thin skull principle or the crumbing skull rule.

[129] Above, I reject Dr. Leith's opinion about Mr. Cross' current low back pain. That opinion is related to causation also, and I reject it for the same reasons.

[130] Dr. Hawkeswood's opinion is that Mr. Cross' accident injuries are materially relevant to his current state of off and on low back pain, but not totally responsible for the off and on back pain because his pre-accident incident of low back pain is an indication that he was susceptible to low back pain.

[131] In addition, both Dr. Leith and Dr. Hawkeswood opined that Mr. Cross suffered a whiplash associated disorder to his low back. It is not disputed that was responsible for the pain Mr. Cross had in the first several months after the accident, which improved while he was off work. After he went back to work, Mr. Cross had low back pain that came and went and was triggered by working in close quarters and awkward positions, as well as with some non work activities. Prior to the accident, Mr. Cross had one incident of lower back pain in 22 years. That single incident was two years before the accident. If that single incident made him susceptible to low back pain, the whiplash disorder is still a but for cause of his on and off low back pain. In other words, at most he had a thin skull in relation to low back pain, but there is no evidence that the crumbling skull rule applies.

[132] I conclude that the accident caused Mr. Cross' back pain that he had in the several months post accident and the intermittent back pain he has had since then.

Mood

[133] All of the evidence pertaining to Mr. Cross' mood issues relate to the accident and demonstrate a major change in mood since the accident. I conclude that his physical limitations and pain due to his accident injuries cause the feelings of frustration, anger, inadequacy and anxiety that I have described above.

[134] I conclude that Mr. Cross' accident injuries are the but for cause of the mood issues I have found he has.

Failure to Mitigate

[135] Mr. Peaker pleaded that Mr. Cross failed to mitigate his damages and during the trial confirmed that he was pursuing that defence. During closing submissions, he abandoned the argument.

Assessment of Damages

[136] The fundamental principle of compensation in personal injury cases is that a plaintiff should receive full and fair compensation, calculated to place them in the same position as they would have been had the tort not been committed, insofar as this can be achieved by a monetary award: *Lines v. W & D Logging Co. Ltd.,* 2009 BCCA 106 at para. 167, citing *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at 962–963.

[137] This principle is accomplished by awarding damages for pecuniary loss in the amount reasonably required to permit a standard of living and day to day functionality that, to the extent possible, approximates what the plaintiff would have experienced but for the wrong occasioned to the plaintiff and in an amount that ensures that non pecuniary damages for pain, suffering, and loss of enjoyment of life will not be eroded by both under-compensation for pecuniary losses.

[138] The premise on which the rough upper limit was set demonstrates that while the heads of damages are to be assessed individually, they are also interlocking. In particular, the future needs of the plaintiff must be met through the pecuniary awards so that the balance struck between restorative care awards and policy-driven non-pecuniary damages will be achieved.

Non-pecuniary damages

[139] Mr. Cross submits that an appropriate award of non-pecuniary damages is $225,000. He relies on cases that awarded between $204,000 and $300,000 (adjusted for inflation to 2024) for injuries that he asserts are similar to those he has suffered and whose circumstances are comparable. Mr. Cross submits it is

appropriate to address loss of housekeeping as part of this category of loss instead of a separate award.

[140] Mr. Peaker submits that an appropriate award is $75,000 and has provided cases that range from $80,000 to $100,000, although the amounts are not inflation-adjusted. The focus of his submission is that Mr. Cross' evidence cannot be accepted for reasons I have already addressed and in large part rejected.

Legal Principles

[141] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities.

[142] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal set out a non-exhaustive list of factors to consider when assessing non-pecuniary damages: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism.

[143] An award for non-pecuniary damages is determined by the 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; and *Langford (City) v. Matthews*, 2024 BCCA 214 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.

[144] It is typical for courts to consider cases in which the plaintiff has suffered injuries similar in nature and duration to those of the plaintiff in the case at bar. Such cases act as a guideline, but should not be used to develop a "tariff" for injuries of a certain type: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637, 1981 CanLII 35.

The Stapley Factors

[145] Mr. Cross was only 24 years old at the time of the accident. He was in a relationship with Ms. Bowles and they were already planning their life together. They have continued on the same path, but they both testified that Mr. Cross has not been the father or parenting partner they imagined.

[146] Mr. Cross testified that when their son, K.J., was very young, he could not hold him with his left arm or rock him to sleep. He testifies that sometimes he cannot get on the ground and crawl around with K.J. He cannot toss K.J. in he air. He testified that he dreamed of teaching his son to hunt, fish, camp and do the things he likes to do. He testified that when he gets home after work, he is in pain and does not have energy he used to have to be active and play with his son.

[147] According to the evidence of Mr. Cross and Ms. Bowles, his lack of energy and engagement in his family, as well as the financial strains his inability to work overtime creates, are causing them to argue frequently. Mr. Cross testified that their intimacy has been negatively impacted by his pain and discomfort.

[148] Mr. Cross' mother testified that before the accident Mr. Cross was optimistic and easy going. She now finds him hard to be around.

[149] As I have described elsewhere in these reasons, Mr. Cross previously loved being part of the Seaspan team of industrial painters, taking pride in their collective accomplishments. He now finds himself in conflict with his co-workers, some of whom describe his current demeanour as aggressive or difficult.

[150] I conclude that the most important personal relationships to Mr. Cross have been significantly detrimentally affected by his accident injuries.

[151] The evidence is uncontroverted that he was a fit individual who spent his free time doing physical chores and physical activities. He sought and did physically challenging work. At the time of the accident, Mr. Cross' recreational interests included hiking, surfing, hunting with a bow and arrow, camping and long boarding.

[152] Mr. Cross testified that he no longer hunts with a bow and arrow because he can only fire a few arrows at a time. He has switched to hunting with a rifle which he does not find as satisfying. He testified that he tried surfing once and will not try it again because he does not have enough strength or pain free motion to swim with the board or do an overhead paddle. He has been snow boarding, but not as often.

[153] Mr. Cross' impairment of these interests is exacerbated because of his young age and the breadth of interests involving physical activity he had.

[154] Based on the evidence, Mr. Cross will have ongoing pain. The greatest chance of improvement for Mr. Cross is if he can work on his mental health. I also am of the view, as I will set out below, that Mr. Cross could find work that does not aggravate his pain as much, which will also in turn assist with his mood. So, while the evidence does not support that his pain will go away, there is room for meaningful improvement to his pain and his mood. Improvements in either will positively affect the other.

Loss of Housekeeping

[155] Domestic services which were interrupted or eliminated by accident injuries are compensable: *Ker v. Sidhu,* 2023 BCCA 158 at para. 23, citing *Liu v. Bains*, 2016 BCCA 374 at para. 25. The loss can be treated as an aspect of pain, suffering and loss of enjoyment of life, or it can be assessed separately: *Mckee v. Hicks*, 2023 BCCA 109 at para. 112.

[156] Mr. Peaker argues that there has been no loss because the tasks that Mr. Cross took on at his mother's house and those he is not doing in his current home have been taken over by other family members.

[157] Mr. Peaker relies on *Doberstein v. Zhao*, 2020 BCSC 1788 citing *Flores v. Johnston*, 2020 BCSC 655, for the proposition that in some cases, the assistance of family members will not rise to the level where it is appropriate to make a compensatory award. The reasoning in those cases is consistent with the trial judges not being persuaded that the plaintiff had a loss of housekeeping capacity

because the level of assistance that family members were providing was to be excepted normally and was not different from before the accident. As explained by the Court of Appeal in *McTavish v. MacGillivray*, 2000 BCCA 164 at paras. 67–68, housekeeping is not a hobby that is analogous to an amenity, it is an economic service that, if replaced, or if capable of replacement in the future, including by family members, should be compensated.

[158] I do not agree that in this case, the assistance by family members means there is no loss and, in addition, the evidence supports that some things are simply not done or not done well.

[159] Ms. Cross testified that after Mr. Cross' father died, Mr. Cross took on responsibility for outdoor tasks at the family acreage in Shirley and helped her with repair work inside the house but was not able to do so after the accident. I have addressed this specifically in an in trust claim below, at this point I merely note that Mr. Cross had a pre-accident history of providing valuable household services.

[160] Both Mr. Cross and Ms. Bowles testified that when they moved to their home in Duncan, they agreed that Mr. Cross would mainly do the outside work, she would be responsible for inside the home, and they would share daily chores such as doing dishes and laundry. Ms. Bowles testified that they had agreed that they would have children and that Ms. Bowles would stay at home with the children. She testified that they had plans to improve aspects of their home, including that Mr. Cross was going to build a fence, a deck, and paint the exterior. She testified that Mr. Cross has not done those things and they cannot afford to hire someone else to do them.

[161] Mr. Cross testified that he struggles with outdoor chores such as raking, lawn mowing, although that is a little easier because they have a self-propelled mower. He testified that he breaks up the outside work to make it more manageable. He testified that he struggles with snow, and if there is more than one snow fall he will not get to shovelling more than once. He testified that either things do not get done, or Ms. Bowles does it. He testified he does not like that because he does not want to put extra work on her because he is not doing his share.

[162] Mr. Cozens testified that the yard that Mr. Cross is supposed to maintain is a mess. He testified that he does not say anything, but it does not get mowed when it needs it and there are things lying all over the place that should be cleaned up.

[163] Mr. Cross and Ms. Bowles both testified that Mr. Cross does not spend much time caregiving their young son. Mr. Cross testified that after work, he often goes for treatment or to the gym in order to maintain his physical fitness and manage his symptoms. He testified that by the time he gets home from that, he is too tired or in too much pain to play with his son.

[164] Ms. Bowles, Mr. Cozens, and Mr. Cross testified that Ms. Bowles' mother and Mr. Cozens look after K.J. two days a week. One day Mr. Cozens, picks up K.J. in Mill Bay and takes him to his home in Langford. Mr. Cross picks him up on the one way home. One another day during the week, Ms. Bowles' mother comes up to Duncan and looks after K.J. so that Ms. Bowles can have a break and do things outside of the house without K.J.

Comparator Cases

[165] Mr. Cross relies on the following comparator cases: *Sirak v. Noonward,* 2015 BCSC 274 ($204,000); *Broad v. Clark*, 2018 BCSC 1068 ($223;000); and *Moen v. Grantham*, 2024 BCSC 937 ($300,000).

[166] In both *Sirak* and *Broad,* the plaintiffs had back conditions that either required surgery or were likely to require surgery. The plaintiff in *Sirak*, a commercial painter, was only able to work 20-30 hours per week. The plaintiff in *Moen* had diagnosed psychiatric conditions that were much more severe than Mr. Cross' undiagnosed mood symptoms.

[167] Mr. Peaker relies on *Di Pascale v. King*, 2023 BCSC 1815 ($100,000); *Coffey v. Sabbaghan*, 2021 BCSC 63 ($80,000); *Randall v. Boettger*, 2020 BCSC 802 ($100,000), *Glass v. Dhaliwal*, 2020 BCSC 186 ($90,000); *Walks v. Cody*, 2019 BCSC 1371 ($90,000); and *Khademolhosseini v. Ji*, 2019 BCSC 854 ($85,000).

[168] Mr. Peaker did not provide current day values for the amounts awarded in the cases on which he relies. Except *Di Pascale*, without the equivalent values, they are too dated to be useful. In *Di Piscale,* the plaintiff was 57 years old and so Mr. Cross' award should be higher, all other things being equal. While the injuries, the evidence in that case included that the plaintiff had significant recovery after the first six months, including to her mood. In this case, while Mr. Cross had some recovery after the first six months, he has continuing disabling symptoms and some of his symptoms are getting worse, including his mood.

[169] Considering the cases and the Stapley factors, I consider the appropriate range to be $170,000 - $190,000 before considering loss of housekeeping.

Assessment

[170] Considering the *Stapley* factors, the loss of housekeeping component of the award, and the comparator cases, I assess damages for pain, suffering and loss of enjoyment of life at $195,000.

Loss of Earning Capacity

[171] At the time of the accident, Mr. Cross was working as an apprentice at Seaspan and was well down the road in obtaining his Red Seal designation as an industrial painter. Industrial painters employed at Seaspan are covered by a collective agreement between Victoria Shipyards Co. Ltd. and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 191.

[172] Mr. Cross testified that Seaspan's work is on ships serviced by Victoria Shipyard including military frigate, fish boats, cruise ships barges and cargo ships. Mr. Cross testified that industrial painters do prep work and then repaint steel components of the vessels. Mr. Cross and Mr. Lauzon testified that 80% of the work of an industrial painter is prep work. Prep work involves using pneumatic tools to remove the old coating and corrosion. The tools weigh between two and twenty

pounds and vibrate significantly while being used. Mr. Lauzon testified that prep work is more laborious than painting, but both are physical work.

[173] The painting is accomplished with long poles to which rollers are attached. The work involves repetitive motions, overhead work, work at altitudes in lifts or buckets, work in small cramped spaces, and work on hands and knees.

[174] Mr. Cross and Mr. Lauzon both testified about how tasks are assigned at Seaspan. Mr. Lauzon and the other charge hands are responsible for assigning tasks. Each industrial painter is assigned a specific area and type of work, be it prep or painting, on a ship. That assignment is a task, and the worker to whom it is assigned will work on it until it is completed. An industrial painter can ask to have a task switched, but that is not frequent or encouraged.

[175] Mr. Cross described the positions that workers have to take, including contorting their bodies to get a hard to reach places, crouching or kneeling and overhead work. Mr. Cross testified that some of these tasks would require two or more shifts with worker using the tools in challenging positions. Mr. Lauzon testified that because many of the tasks involved repetitive motions, overhead work and or cramped quarters, the workers are permitted to take micro breaks, in addition to their regularly scheduled breaks every hour and 45 minutes. However, a worker's skill and productivity is a result of the quantity and quality of the work they produce each shift, and extra breaks can negatively affect the quantity of work produced.

[176] Mr. Cross testified that when a ship is in the dock, the work has to be completed within a certain timeframe. If overtime hours are necessary to complete that work, they will be assigned to the most competent and efficient industrial painters. Mr. Lauzon confirmed that approach.

[177] Mr. Cross testified that prior to the accident, he jumped at the chance to do the physically demanding and difficult prep jobs. He testified that he liked to put his head down and work and he would find that the shifts flew by. Mr. Cross also testified that before the accident, he worked whatever overtime was offered to him

and he was often offered overtime. Mr. Cross testified that he bought a travel trailer so that when he was working long shifts with overtime he could sleep in the trailer and avoid his commute time to and from Esquimalt and Shirley.

[178] Mr. Lauzon testified that before the accident, Mr. Cross was one of the top industrial painters and was frequently offered overtime. Mr. Lauzon described Mr. Cross as one of the "go-to guys" because he was able to complete a lot in a given amount of time and because his work was good. Mr. Lauzon testified that before the accident, he did not observe Mr. Cross having any difficulties with any task that he was assigned to do.

[179] Justin Evans, a journeyman industrial painter at Seaspan, testified. Mr. Evans testified that the seasoned journeymen who have proven themselves to be reliable and who did not need to be supervised because they can do the most difficult tasks get the most overtime hours. He testified that before the accident, Mr. Cross was one of those people. He testified that Mr. Cross was very serious about his work, was a perfectionist, and would take on the hardest jobs that were available.

[180] Mr. Cross testified that he felt his work was well regarded because he was given the responsibility to educate and teach newer apprentices. He testified that he had the goal of becoming a charge hand. Mr. Lauzon testified that one of his responsibilities was to assess the industrial painters to determine who was appropriate to become a charge hand in the future and that he had assessed Mr. Cross as being potential charge hand material.

[181] At the time of the accident, Mr. Cross was earning $34.54 per hour, plus overtime and benefits. The trade rate at that time, the wage paid to Red Seal qualified industrial painters, was $40.64. Mr. Cross completed the Red Seal inter-provincial examination on December 14, 2017. However, Seaspan's requirement for hours worked to qualify for Red Seal pay was higher than the international standard requirement. Prior to the accident, Mr. Cross expected to obtain that higher threshold within about 6 months of October 2018.

[182] Mr. Cross testified that before the accident he felt very optimistic about his future work. He felt he was moving in the direction of a charge hand position. He did not perceive any problems meeting the job demands including the overtime work. Mr. Cross testified that he liked the work environment and his coworkers. He testified that he was happy to be asked to help anyone with anything. He did not perceive any difficulties with any of his coworkers. He testified that he took pride in being part of the team that refitted the ships in the shipyard.

[183] Mr. Cross was off work between October 2018 and February 2019 (except that he worked 1.75 hours on October 17, 2018), and then did a gradual return to work. Mr. Lauzon testified that after a safety assessment, an injured worker will be given light duties with the expectation that the worker will recover and resume fully duties. Mr. Lauzon testified that a worker cannot be accommodated with light duties permanently because the job description requires the ability to do tasks that exceed light duties.

[184] Mr. Cross testified that since the accident, he experiences neck pain with overhead work, left shoulder pain with repetitive work, overhead work with vibrating tools, and experiences low back pain in certain positions. He finds that overhead tasks aggravate his neck pain, which can then cause tension headaches. Mr. Cross testified that he tries to avoid straining his neck by looking up, and that causes him to have to take a lot more time to do certain tasks.

[185] Mr. Cross also testified that he is slower at his work due to pain and lack of mobility. He gave an example of a panel on a ship which he said he would have been able to paint in about an hour prior to the accident. He testified that now, he would have to bring the basket in which he would be positioned to do the work closer to the ship, modify his tools, and slow down. He testified that due to his left shoulder, he only uses his right hand to spray paint when previously he could use his right or left. In some cases, the angles or spaces make using his left hand less awkward and more efficient.

[186] Mr. Cross testified that after the accident, he did a prep job in cramped quarters using a die grinder and a barrel gun, both pneumatic tools that vibrate. He testified that he worked on the job for two days, and then asked for a rotation to another job because he was experiencing pain in his neck, a bad tension headache, a flared up left shoulder and a sore low back from the position he had to get his body into to access where he had to work. He was given a different task to do but eventually had to come back to the previous one, because the charge hand wanted him to complete the task he was assigned.

[187] Mr. Lauzon testified that when Mr. Cross retuned to work in February 2019, he showed limitations in his physical movement such that he was not the same person he was before the accident. In particular, he was slower in his work when rolling paint onto the side of a ship. Mr. Lauzon testified that he has observed Mr. Cross appearing to be in discomfort. He observed Mr. Cross butting heads with other workers inconsistent with being a team player.

[188] Mr. Lauzon testified that he noticed that when Mr. Cross started his graduated return to work in February 2019 and tried to work with him to understand the problem. He testified that they assigned him lighter tasks such as rolling or with light power tools that he did not have to use overhead.

[189] Mr. Evans testified that since the accident, Mr. Cross is different from the co-worker they were used to. He is slower and does not volunteer for the strenuous jobs. He testified that Mr. Cross appears sore and frustrated and he has become aggressive and confrontational.

[190] Mr. Lauzon testified that he does not offer Mr. Cross as much overtime because he is no longer one of the best guys who can get work done well and quickly. Mr. Lauzon testified that, in his observation, Mr. Cross' performance is deteriorating still. He testified that Mr. Cross is no longer able to handle some of the tasks that he could when he began his rehabilitation at work.

[191] Despite the physical nature of the work, Mr. Lauzon testified that at Seaspan, many industrial painters work until their union pension maximizes at age 65. He explained that a worker becomes eligible for a pension at age 55, but the pension is 6% less for each that a retiree is under the age of 65 when he or she retires.

[192] Mr. Lauzon testified that before the accident, compared to other workers, Mr. Cross was considered one of their top painters to get job done. He had no physical problems that caused him difficulty with the job duties. In terms of skills, he was one of their top painters and so was a “go to guy” for overtime. He was offered overtime and took everything he was offered. Mr. Lauzon testified that Mr. Cross was a team player who got along with other people.

[193] Mr. Lauzon testified that it is part of his responsibilities to assess workers for the abilities to become a charge hand. He testified that he believed that Mr. Cross had the ability to be a charge hand because of his skills at painting, his ability to work well with others, and an aptitude to put it all together to manage jobs and manage people.

[194] Mr. Lauzon testified that overtime is available on all of the types of ships that typically come into the Victoria shipyards, although some of those ships, in particular a military frigate, will have less overtime than others. Overtime includes an extra 2 to 4 hours added to a regular 8 hour shift and 8 to 12 hour shifts on the weekends.

[195] Mr. Lauzon testified for him, overtime amounts to 10-20% of his annual earnings. He testified that he did as much as he was asked to do when he first started out, but he tries not to work overtime now.

[196] Mr. Evans testified that prior to COVID-19, the maximum overtime given to any worker was about 300 hours but now it is about 400 hours and can amount to between $30,000 and $40,000 extra earnings in a year. According to the pay records overtime is paid at one and half or two times the regularly hourly rate, which is currently $47.68 per hour.

[197] Seaspan laid off Mr. Cross from November 2, 2020 to December 12, 2021, due to reduced work that was attributed to the Covid-19 virus. Mr. Lauzon testified that the process at Seaspan was that they identified the top performers and then laid off other people until they got to the number of lay offs they required. Mr. Cross was not one of the people Mr. Lauzon chose as a top performer to be kept on if possible, because at that time, he was showing signs of not being one of their top performers. Specifically, he was slower than he was in the past and his physical movements were impaired.

[198] Mr. Cross found replacement work with two other companies, earning $3,679.89 between November 2, 2020 and the end of 2020. His total earnings for 2020 were $87,542.

[199] In 2021, Mr. Cross earned $68,780 at the replacement work. Mr. Cross testified that most of his work in 2021 was for the second of the two firms he worked during his Seaspan lay off. He testified that he earned a dollar less per hour than at Seaspan and was not working as much—the work was sporadic. He testified that for example, a job might take 3 days, and then there would be no more work for a couple of days. Mr. Cross was called back to work to Seaspan in December 2021 and recommenced work there on December 13, 2021. His total 2021 earnings were $73,200.

[200] Mr. Cross testified that when he returned to Seaspan, he asked for and worked overtime on a large project with tight timeframes. He testified he asked for that overtime because his family was struggling financially. He and Ms. Bowles bought a house in the summer of 2020, their son was born in the fall of 2021 so Ms. Bowles was not working, and he was earning less while laid off from Seaspan.

[201] Mr. Cross testified that the overtime work was really challenging. He testified that he struggled to do any thing at home after work, and he was taking up to six Aleve and Advil tablets a day.

[202] In 2022, Mr. Cross earned $101,953, In 2023, Mr. Cross earned $102,925.

[203] In the first half of 2024, Mr. Cross earned $57,000 at Seaspan.

[204] Mr. Evans testified that Mr. Cross appears to be doing light duties and work that Mr. Evans described as menial, or well below Mr. Cross' skill set. He testified that Mr. Cross is often frustrated, argues over small things, has become aggressive and is now hard to work with.

Past

[205] Mr. Cross seeks a past loss of earning capacity award based on assertions that he could have earned more than he did during various timeframes and various scenarios between the accident and the commencement of trial.

[206] As with all personal injury compensatory damages, past loss of earning capacity is intended to restore the plaintiff the position he or she would have been in but for the defendant's negligence.

[207] For past loss, the question is what the plaintiff would have, not could have, earned based on real and substantial possibility: *Hartman v. MMS Homes Ltd.*, 2023 BCCA 400 at para. 64 citing *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141; *M.B. v. British Columbia*, 2003 SCC 53; and *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144.

[208] The burden of proof regarding actual past events is the balance of probabilities. However, some of the facts pertaining to past loss of earning capacity may be hypothetical. For example, what the plaintiff actually earned between the accident and trial is an actual fact subject to proof on the balance of probabilities. What the plaintiff could have earned absent the accident is a hypothetical fact and even though it is a past hypothetical fact, it can be established based on demonstrating real and substantial probability: *Athey* at para. 27; and *Dornan* at para. 94.

[209] The court assesses damages for past loss of capacity and does not calculate them mathematically. Allowances for contingencies should be made and the award

must be fair and reasonable taking into account all of the circumstances: *Falati v. Smith*, 2010 BCSC 465 at para. 41, aff'd 2011 BCCA 45.

[210] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that in the ordinary course the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62.

[211] Mr. Cross' economist expert, Mr. Coleman, testified that the collective agreement governing Mr. Cross' pay provides for non wage benefits in the form of contributions to a health and welfare benefit plan and a pension plan. Mr. Coleman assumed that the value of these benefits at least equals the cost to the employer of providing them, which, according to the collective agreement, is $8.10-$8.20 per hour of work. This assumption was not challenged.

[212] In addition, Mr. Coleman assessed pre-trial losses net of taxes. For pre-trial overtime, Mr. Coleman provided a value to be applied for each hour of overtime worked in a week. That value includes the non wage benefits but it is not net of taxes. Mr. Coleman opined that an adjustment should be made to such calculations to take the taxes out. In his example, he reduces the pre-trial overtime losses by 40% to back out taxes.

October 31, 2018 to December 31, 2019

[213] Mr. Cross submits that the difference between what he could have earned, and what he did earn between the accident and the end of 2019 is $63,509 based on lower earnings due to not working and working less that full time between between October 31, 2018 and November 2019 when he was off work completely and then on a gradual return to work; earning less per hour because he did not obtain his Red Seal hours when he otherwise would have; and because he earned less due to not working overtime.

[214] The loss of earnings due to not working at all or working less than full time at the pre-Red Seal rate while he was off work and on gradual return to work are not controversial.

[215] With regard to the loss due to not achieving the Red Seal designation earlier, Mr. Cross testified that in October 2018, he was just less than 1000 hours short of the Seaspan hour requirement to earn Red Seal wages. He testified that that he would have worked enough hours to qualify for Red Seal pay at Seaspan within about 6 months of October 2018, and given that a full year of work is about 2000 hours, that makes sense. Due to being off work and then on a graduated return to work, Mr. Cross did not achieve Red Seal status in November 2019.

[216] However, Mr. Cross' economist assumed that but for the accident, Mr. Cross would have started earning the Red Seal pay in January 2019. It is not clear why this assumption was made. On cross examination, Mr. Coleman agreed that as a result he overestimated Mr. Cross' net earnings absent the accident by 5%, which is $5,389.20.

[217] Mr. Cross' position is that the use of the 2023 hours by the economist as the comparator understates the loss and provides an offset to the problematic Red Seal rate assumption. Mr. Cross' submission is that in 2023 Mr. Cross was working fewer hours than he would have if he was healthy and he took unpaid vacation days, sick days and medical absences due to his injuries. However, Mr. Cross has not quantified this in a manner that allows me to assess whether it is truly offsetting of the problematic Red Seal rate assumption.

[218] With regard to lost opportunity to work overtime, Mr. Peaker submitted that Mr. Cross' economist approach was inappropriate because he based his calculations by comparing what Mr. Cross actually worked and earned in 2023, including what overtime he worked, to this early post-accident timeframe. Mr. Peaker argues that 2023 is an inappropriate comparator because the evidence was that in 2023, the shipyard was very busy while in 2019, the shipyard was already in a "pre-COVID" slow down and so there was not as much overtime. Leaving aside that no

one in 2019 knew that COVID-19 was imminent and so it could not really have been a slow down attributable to COVID, the evidence from Mr. Evans is that prior to COVID overtime maxed out at 300 hours per year, and now it maxes out at 400 hours per year.

[219] The records show that in 2018, in the roughly 10.5 months prior to the accident, Mr. Cross worked about 271 hours of overtime. In 2023, post-accident, Mr. Cross worked 107.5 hours of overtime. This evidence corroborates the evidence that before the accident, Mr. Cross was one of the top guys for overtime because in less than a full year, he worked near to what Mr. Evans testified was the maximum of overtime available to the top guys during that timeframe, about 300 hours. In 2023, he worked slightly more than a quarter of what Mr. Evans testified would be the maximum of overtime for a top guy post-COVID, about 400 hours.

[220] Accordingly, even accepting that 2019 was in line with 2018 or lower for overtime, by using the 2023 rate of 107.50 hours overtime, Mr. Cross' economist has not overestimated the overtime he likely would have worked in this period.

[221] I conclude that the estimate of losses for this period should be reduced by $5,400 for the problematic Red Seal rate assumption. I assess them at $58,000.

November 2020 to December 2021 COVID-19 Layoff Period

[222] Mr. Cross testified that in early 2020. when the COVID-19 pandemic commenced, Seaspan went to a shared work program so that fewer people were working at a time. He does not claim a loss for this period because he is of the view that the reduced work was not caused by the accident but rather by the pandemic. Mr. Cross testified that although he earned less, it worked for him because it was like being on a graduated work schedule without having to qualify for one.

[223] In November 2020, Mr. Cross was laid off due to lack of work due to the COVID-19 pandemic. He claims income loss for the period of the lay off because he claims that if he had not been injured, he would have been one of the top guys and he would not have been laid off. Mr. Cross seeks losses for the time he was laid off

between November 2020 and December 2021 on the basis that the replacement work he found paid less and was more sporadic.

[224] Mr. Cross and Mr. Lauzon testified that not all painters were laid off. Mr. Lauzon testified that he was one of the persons responsible for deciding who to lay off. He testified that Mr. Cross was laid off because Mr. Lauzon no longer considered him to be one of the top guys for the reasons I have set out above. I accept this evidence.

[225] In my view, the evidence meets the real and substantial possibility threshold of establishing that but for the accident, Mr. Cross would still have been one of the top guys and would not have been laid off.

[226] Mr. Cross earned $73,373 in 2021 working most of the year for the other employers. Mr. Cross calculates his loss at $26,000 based on a gross loss of $36,500 as the difference of a full year at Seaspan with no overtime and what he was able to earn by replacement income.

[227] In my view, that overestimates the loss. First, the evidence is that in 2020 before the layoffs, Seaspan was working fewer painters at a time in order to meet COVID-19 rules pertaining to how many people could be in close quarters at any given time. His pay for 2020, 11 months of which he worked on COVID-10 reduced shifts at Seaspan, reflects this as it was $87,294, compared to over $100,000 at the full time Red Seal pay rate. There was no evidence that Seaspan increased the working hours of those who were not laid off through the duration of the pandemic and so his 2020 income is a better comparison for what he would have earned in 2021,had he not been laid off, taking into account that he had 11 months of income in 2020 before he was laid off.

[228] In addition, there is a chance, which I assess at 25%, that Mr. Cross would have been one of those laid off for the whole or part of the year even if he was still one of the top guys.

[229] Taking all of this into account, I assess his net loss for this period at $12,000.

Unpaid Absences from January 1, 2022 to Date

[230] The evidence of all the Seaspan industrial painters is that since Seaspan called laid off workers back to work at the end of the 2021, the shipyard has been very busy.

[231] Mr. Cross testified that he came back and worked overtime, and has been working full time since. He testified that he takes sick days, medical leave or unpaid vacation days to deal with the pain from working with his accident injuries. He testified that he is entitled to five sick days a year without a doctor's note. He testified that after five, he needs a doctor's note. He can also take unpaid vacation up to 15 days. Mr. Cross testified that he is supposed to give advance notice of days to be taken as unpaid vacation. Accordingly, if he has a pain issue that has flared up, he takes sick days up to the five he is entitled. He books unpaid vacation time on a regular basis, often around a weekend or a long weekend, to give himself an extended break to recover from pain.

[232] Mr. Cross' employment records were in evidence and agreed to. The post accident years before 2022 are not applicable to Mr. Cross' claims for unpaid vacation days, unpaid sick days and medical absences because in 2019, he was on a graduated return to work, in 2020 the shipyard was operating under the COVID-19 reduced model which Mr. Cross testified was like being on a graduated return to work, and from November 2020 to December 2021, Mr. Cross was laid off.

[233] Mr. Cross has reviewed the records and totalled the unpaid vacation days, sick days and medical absences for the years 2022, 2023 and 2024 to date. The hours per year, translated into days off based on 8 hour shifts, are as follows:

a) 2022: 144 hours or 18 shifts.

b) 2023: 182.75 or 22.75 shifts.

c) 2024 (to July 31): 48.75 hours or 6 shifts and three quarters of an hour.

[234] At Mr. Cross' hourly rate at the applicable times, the lost work totals $17,614.

[235] Mr. Peaker has provided a summary of the unpaid vacation days only, which are 6 days in 2022, 8 days in 2023, and 1 day in 2024. Mr. Peaker does not count unpaid sick time or medical leaves. He rationalizes that based on an assertion that some of the sick days line up with medical records showing other illnesses.

[236] Mr. Peaker did not ask Mr. Cross about whether he took medical leaves or sick days for reasons other than accident injuries during this time frame and did not put into evidence or draw my attention to any clinical records in evidence that demonstrates illness from non-accident causes corresponding to time off work. Mr. Peaker did ask Mr. Cross about unpaid vacation days for his wedding and to attend a friend's funeral. I agree those days are not attributable to the accident, but given Mr. Cross' evidence about taking sick days and unpaid vacation, I accept that he has lost the other time due to his accident injuries.

[237] Mr. Peaker also does not include the time that Mr. Cross took off work due to low back issues in May 2024 because he asserts that low back problem was brought on by the functional capacity evaluation testing and because his position is that Mr. Cross' low back pain is not accident caused. However, Mr. Peaker also argues that Mr. Cross did not have an onset of low back pain caused by the testing and that caused him to miss work. Accordingly, Mr. Peaker's approach to this is internally inconsistent. In any event, I have found that Mr. Cross' intermittent low back pain is legally caused by the accident and flared up and then went into spasm following the functional capacity evaluation, causing him to miss work.

[238] I award Mr. Cross $16,800 for past wage loss due to sick days, unpaid vacation days and sick leave.

November 2019 to the Present – Loss of Overtime

[239] As I have described, Mr. Evans testified that before COVID-19, a top guy at Seaspan could work about 300 hours of overtime a year. This evidence is corroborated by Mr. Cross' employment records, which show him working 271 hours of overtime in the 10.5 months before the accident in October 2018.

[240] Mr. Evans testified that currently, a top industrial painter at Seaspan will have the opportunity to work up to 400 hours a year in overtime.

[241] Mr. Lauzon testified that the availability of overtime depends on what vessels are in dock. The commercial vessels come in and go out on a set schedule, with a tight turn around so that they can get back to commercial activity, and those are the projects that create overtime. Mr. Lauzon testified that a vessel that requires overtime work can result in 30 hours of overtime for a worker in a week, but that does not happen week in and week out. He testified that if all of the overtime work was compressed back to back, it would amount to about 3 months of the year. At 30 hours per week, that would be 360 hours plus a year, which accords well with Mr. Evans' estimate that at top guy could work 400 hours per year.

[242] With regard to Mr. Cross' prospects for overtime, the evidence is uniform that before the accident he was one of the top guys who was regularly offered overtime. The overtime hours that Mr. Cross worked in 2018 is also objective evidence of that. The evidence is also uniform that he is no longer one of the top guys and so is not one of the first to be offered overtime.

[243] Mr. Cross has worked overtime when it has been offered to him. He testified that when he was called back to work after the COVID-19 layoff, there was overtime available and he asked to work it because he was worried about finances. He testified that his practice is to take overtime when he can and then takes unpaid vacation days to manage any exacerbation of his symptoms caused by the extra hours. This makes financial sense, since overtime pays double time and by taking unpaid vacation days, he foregoes straight time.

[244] Mr. Peaker's position is that Mr. Cross' ability to work overtime is constrained by his responsibilities to his wife and young son, so even if he was offered more overtime than he currently is, he would not take it because he wants to be home more. Mr. Cross agreed that he wants more time with his son, but he also testified that he would work more overtime if he could get it.

[245] I did not understand Ms. Bowles evidence to be that she does not want Mr. Cross to work overtime. He continues to work overtime when it is offered to him and there is no evidence that she has objected to that. I understood Ms. Bowles' evidence to be that when Mr. Cross is at home, she wants him to be physically and mentally able to help with their child, to be the type of parent they envisioned, to help with the housework, to do the yard work and to be an engaged partner. Ms. Bowles is not complaining that Mr. Cross works too much, she is complaining that when he comes home he does not engage and she attributes that to his pain and unhappiness.

[246] I accept that Mr. Cross would not work unlimited overtime for family reasons. However, he also testified that he feels financially pressured because Ms. Bowles is not working. I conclude that but for the accident, Mr. Cross would have been offered more overtime than he has been, and would have worked it up to a reasonable amount so long as it did not unreasonably impinge on his family life.

[247] Mr. Cross' claims for the difference between the overtime he actually worked and the overtime he could have worked at an average overtime of 7.3 hours per week (which is about 380 hours a year) for the years 2019, and 2022 to the present. He does not claim for 2020 or 2021 because COVID-19 was such that there were lay offs, and no overtime, during those years.

[248] In 2019, Mr. Cross worked no overtime, in 2022, Mr. Cross worked 70 hours of overtime, in 2023 he worked 107 hours of overtime, and in 2024 he worked 87 hours of overtime up to July 31.

[249] Mr. Peaker argues that it is inappropriate to assume that Mr. Cross would have worked an additional 300-400 hours of overtime every year because there is generally only three months a year of overtime, because work was slowing down in 2019, and because Mr. Cross does work some overtime still. Mr. Peaker submits that an award of $5,000 is appropriate.

[250] I agree that past income loss is to be assessed and not strictly calculated, but I do not see that as a reason to ignore the evidence and assign an arbitrary number in making that assessment. However, Mr. Peaker has made some points that I incorporate into my analysis as follows.

[251] With regard to 2019, as I noted above, 107.5 hours of overtime was included in Mr. Coleman's calculation of lost wages for that year. There is no specific evidence about what 2019 was like for overtime, other than Mr. Evans' evidence that pre-COVID overtime was topped out at about 300 hours per year. In the absence of evidence from Mr. Lauzon, who assigned overtime that year, and given Mr. Cross' implicit position that the COVID-19 slowdown started before January 2020 even though the pandemic was not declared until March, it is unreasonable to assume Mr. Cross would have worked 300 hours of overtime in 2019. I will assume that he would have worked 250, slightly less than he worked the previous year. Since my assessment of his loss for 2019 includes 107.5 hours of overtime, I assess his overtime loss as a further 142.5 hours, which translates to a pre-tax loss of $14,156. I reduce that by 40% to back out taxes, as Mr. Coleman did in his sample calculation, to come to $8,493.

[252] For 2022 to the present, I assume that Mr. Cross would have worked an additional 360 hours of overtime a year, or an average of 7 hours a week. I do not accept that he would have worked 400 hours a year, because he testified that he was both motivated to earn money, but would also want to be spending more time at home once K.J. was born. Based on Mr. Coleman's tables, and reduced by 40%, the numbers total $64,638 for a total loss of overtime pre-trial of $73,131.

[253] It is appropriate to apply contingencies to these numbers. Possible contingencies are that there would be more or less overtime available in a given year, that Mr. Cross would have chosen to work less or would have competed less successful for overtime due to factors other than his injuries.

[254] I conclude an approximately 10% reduction for contingencies is warranted since the hours I have allowed, particularly since 2022, are near the top of what the evidence indicated might have been available.

[255] I assess past loss of opportunity to earn overtime as $65,000.

Total Past Loss of Income

[256] I assess the total past loss of income to be $151,800.

Future

[257] Mr. Cross is not able to work day in and day out without pain due to his shoulder pain, neck pain, headaches, migraines and occasional low back pain.

[258] Mr. Cross argues that he cannot sustain the current situation and the likelihood is that he will have to retrain. Dr. Hawkeswood and Ms. Szarkiewicz both opined that some physical labour jobs are open to him. Ms. Szarkiewicz opined that Mr. Cross is capable of working in light strength jobs that do not involve repetitive motion of his left shoulder.

[259] Mr. Cross argues that the type of work he could retrain for will reduce his lifetime earning capacity by $2,400,000.

[260] Mr. Peaker argues that Mr. Cross has not shown a real and substantial possibility of his accident injuries causing a future loss because he has worked full time hours since his gradual return to work, albeit with taking unpaid vacation days from time to time. Mr. Peaker argues that I ought not to accept Dr. Hawkeswood's opinion, or Ms. Szarkiewicz's opinion, that Mr. Cross' ability to work as an industrial painter is impaired, because they rely on Mr. Cross' evidence which is not reliable. Mr. Peaker submits that if I make an award for future loss of earning capacity, it should be the equivalent of one year wages, $105,000.

Legal Principles

[261] Assessing an award for loss of future earning capacity involves considering the difference between the likely future of the plaintiff if the accident had not

happened and the plaintiff's likely future after the accident has happened, including the degree of impairment: *Rab v. Prescott*, 2021 BCCA 345 at para. 65. In *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353 at 356, 1985 CanLII 149 (S.C.), Justice Finch (as he then was) explained that the primary question is whether the plaintiff's injuries make the plaintiff "less valuable to himself as a person capable of earning income in a competitive labour market".

[262] In *Rab,* the Court of Appeal articulated a three-step process to assessing loss of earning capacity:

a) the first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity giving rise to the sort of considerations discussed in *Brown* at para. 8;

b) the second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss; and

c) if a real and substantial possibility exists, the third step is to assess the value of that possible future loss, including assessing the relative likelihood of the possibility occurring.

Step 1: A Potential Future Event that Could Lead to a Loss of Capacity

[263] In *Ploskon-Ciesla v. Brophy,* 2022 BCCA 217 Justice Harris explained that when accident injuries have caused a plaintiff to be unable to work at the time of trial and for the foreseeable future, this step may be a foregone conclusion. In cases where there is no clear-cut income loss at the time of trial, the *Brown* considerations referenced in *Rab* are particularly important. Justice Harris referred to paras. 36 and 37 of *Rab*, at which the Court of Appeal explained that these considerations are means to assess whether the plaintiff's capital asset has been impaired.

[264] Mr. Peaker argues that because Mr. Cross returned to full time work at Seaspan, any initial impairment to his capital asset has resolved and there is no impairment that could cause a future loss.

[265] I am of the view that despite that Mr. Cross has returned to work full time, there is evidence of future possible events that will lead to a loss of capacity.

[266] First, the evidence establishes that Mr. Cross will continue the practice of taking unpaid sick days, unpaid medical leave and unpaid vacation days as described above to manage his pain which is aggravated by his work.

[267] Mr. Peaker argues that Mr. Cross' evidence is that he takes unpaid time off when he feels like he is getting burned out and this is not evidence that Mr. Cross has problems with pain from his accident injuries but rather that he just needs a mental break from work. I do not interpret his evidence this way or that the whole of the evidence supports the argument that days off are not in part due to physical pain. Mr. Cross described how certain tasks aggravate his shoulder, upper back and neck and cause headaches. He described how other tasks aggravate his low back. I conclude that Mr. Cross' evidence that he takes unpaid time off to avoid becoming burned out, is a reference to his work aggravating his accident symptoms.

[268] Dr. Hawkeswood described that Mr. Cross exhibits the "wear down affect" from pain. He explained that wear down effect does not have a clear medical definition, but it is an observation seen in persons who have chronic pain. It describes persons who have decreased functionality due to having less energy, feeling defeated, and having mental health issues, usually depression.
Dr. Hawkeswood opined that Mr. Cross has a significantly heightened risk of needing to take sick days, going on short term disability, long term disability, or early retirement due to his accident injuries.

[269] Dr. Leith opined that Mr. Cross can keep working but also that he should expect some pain at work, and that it is "certainty reasonable" for him to continue his practice of taking time off on occasion due to his left shoulder symptoms. Dr. Leith opined that this would not continue indefinitely, but he did not put a time limit on it

nor opine what mechanism would eliminate Mr. Cross' pain which has persisted for more than five years post accident.

[270] As I will explain further, I am of the view that a scenario that Mr. Cross keeps working as an industrial painter at Seaspan despite his injuries is possible, but not likely. But even allowing for that possibility, there is certainly a future event that will cause a loss because he will need to take unpaid leave to manage the pain from his injuries as he does now and as Dr. Leith and Dr. Hawkeswood have opined will continue to be necessary.

[271] The second future event demonstrated on the evidence is based on the uncontroverted evidence that Mr. Cross is no longer a go to guy and so is not offered the overtime he would be if he was still one of the top guys.

[272] As discussed above, Mr. Peaker argues that it does not matter that Mr. Cross is less likely to be offered overtime, because since having a child Ms. Bowles wants Mr. Cross to be at home more, so his ability to work overtime is constrained by the growing family. I do not accept that argument for the same reasons set out above.

[273] I conclude that Mr. Cross will suffer future losses of opportunities to work overtime.

[274] The third future event that could lead to a loss of capacity is based on Mr. Lauzon's evidence that if a person cannot get back to regular duties, eventually that person will be laid off. Mr. Lauzon is part of the management that decides who will be laid off. Mr. Lauzon testified that they have been trying to manage Mr. Cross' difficulties. As I have already described, Mr. Lauzon described the features of Mr. Cross' decreased performance. Mr. Lauzon testified that he perceives that Mr. Cross is getting worse, not better.

[275] I conclude that because of his diminished performance, Mr. Cross is vulnerable to being laid off from Seaspan.

[276] The fourth potential future event arises from the evidence of Mr. Lauzon that Mr. Cross is being given lighter duties and tasks that do not involve as much overhead work and heavy tools. He testified that this cannot go on indefinitely. Mr. Cross testified that he has had discussions with his superiors at Seaspan based on which he does not believe that he can continue with light duty assignments. I note that what other people have told him is not admissible through Mr. Cross' evidence for proof that, for example, his time to be assigned light duties out of proportion to other industrial painters will come to an end. His evidence on the topic is admissible only to understand the *Brown* factor of whether and why Mr. Cross is less valuable to himself as a person capable of earning income in a competitive labour market. Mr. Lauzon's direct evidence demonstrates that Mr. Cross' understanding is accurate.

[277] If Mr. Cross is not permitted to work light duties in greater proportion than the average industrial painter, he would likely experience greater pain at work and need more time off or not be able to continue.

[278] Mr. Lauzon, Mr. Evans and Mr. Cross all testified about him having problems getting along with others that seem related to his injuries. The evidence of Mr. Lauzon and Mr. Evans leads to the conclusion that this tension and Mr. Cross' workplace irritability, coupled with his reduced productivity, make him a less valuable employee to his employer. From Mr. Cross' evidence, it is clear that Mr. Cross perceives himself to be a less valuable team member at Seaspan.

[279] Accordingly, consideration of the *Brown* factors leads to a conclusion that there is a likely future event that will cause a loss of capacity.

[280] Related to this, Mr. Cross testified that given the manner in which work exacerbates his pain, he does not know whether he can sustain it and has given thought to retraining for work that is less physically strenuous. He is thinking about becoming a social worker. He testified that about two years ago, he talked to a career counsellor at a university and understands becoming a social worker would involve upgrading some of his education and then a two year degree. Mr. Cross

finds the prospect of a two year degree daunting—he is worried he would not pass the courses. He testified that he has not done anything about it because he cannot afford to stop working and go back to school. He testified that in order to do so, he would have to work a lot of overtime and save a lot of money. He does not have the ability to work that much overtime.

[281] Dr. Hawkeswood testified that due to the wear down affect from pain, Mr. Cross' risk of requiring a work transition or discontinuing his work altogether is at least moderately high. On cross examination, Dr. Hawkeswood, when challenged about this opinion, testified that he would say that on a given day, Mr. Cross can push through and do his job. He testified that at the same time, his medical opinion, while trying to not be paternalistic, is that Mr. Cross should not undergo an undue degree of suffering while at work. He also agreed on cross examination that Mr. Cross is not disabled from all physical work.

[282] Dr. Leith was cross examined about his opinion that, subject to needing to take time off to deal with his symptoms, Mr. Cross was not disabled from working as an industrial painter. He testified that he knew Mr. Cross worked at a job that was physical and involved overhead work. Counsel for Mr. Cross asked him if he asked Mr. Cross how much of the work involved overhead work, pushing and/or pulling. Dr. Leith testified that he did not ask that and did not specifically ask Mr. Cross how he was doing at work. He testified that it was clear to him that although Mr. Cross sometimes has to take the odd day off, and despite having occasional muscular pain, was doing well compared to someone who had lost a limb.

[283] This opinion is problematic for two reasons. First, it is not supported by the evidence. Dr. Leith seems to have assumed that, since Mr. Cross takes the odd day off, those are the only days he has pain. That is inconsistent with what Mr. Cross testified to and there is no evidence Mr. Cross told Dr. Leith that. He concluded that Mr. Cross is not receiving modified duties, which is also contrary to the evidence. Second, the comparator of how Mr. Cross is doing to someone who has lost a limb is irrelevant and unhelpful.

[284] As noted above, Dr. Leith did not account for the difference between 80% of normal and 100% of normal in shoulder strength, mobility and function. One would think a 20% decrease in strength, function and/or mobility is significant for a person whose occupation requires shoulder strength and regularly requires overhead work. If it is not significant, the lack of significance requires explanation, which Dr. Leith did not provide. Dr. Leith also acknowledged that Mr. Cross' shoulder pain is significant enough that it is reasonable for Mr. Cross to continue to take time off to manage it.

[285] Ms. Szarkiewicz opined that Mr. Cross is not capable of performing the critical demands of his job as an industrial painter part time or full time and he is limited to light strength jobs.

[286] Mr. Peaker submits that the Court should not rely on the functional capacity assessment conducted by Ms. Szarkiewicz because Ms. Szarkiewicz testified that Mr. Cross' report that he had a flare up of low back symptoms that caused him to have to take time off work was significant to her opinion. As I have related, I accept that Mr. Cross had a flare up of low back symptoms immediately after the functional capacity evaluation, but the spasms that required him to take time off work did not occur until about four to five weeks after the functional capacity evaluation.

[287] Given that assumption made by Ms. Szarkiewicz has not proved to be entirely accurate, it is necessary to look at her report and evidence to determine how her opinions would have changed had the accurate information about the timing of Mr. Cross' time off work been available. Through no fault of Mr. Peaker, that information was not available to his counsel when she cross examined Ms. Szarkiewicz.

[288] It is important to put Ms. Szarkiewicz' evidence that Mr. Cross had back spasms following her assessment and had to take time off work into context. She considered that significant to confirm her impression that Mr. Cross was pushing himself at the functional capacity evaluation and that by pushing himself, he pushed himself into back spasms and time off work. An accurate understanding would have been that Mr. Cross' efforts at the functional capacity evaluation triggered low back

pain, which pain had been off and on at the time of the assessment, and over a few weeks, he also developed back spasms during a time when Mr. Cross was working in a cramped position and doing dead weight lifts at the gym.

[289] In addition, Ms. Szarkiewicz stated that Mr. Cross told him that the flare up of pain caused him to have reality check about his future as an industrial painter. The supporting context for Ms. Szarkiewicz' consideration of that statement is different from the timing of what happened. However, given her misunderstanding of the timing, I must assume that she regarded this as more significant than it would be if she had an accurate picture of the timing.

[290] While Ms. Szarkiewicz testified that the post functional capacity evaluation low back problems were important to her opinion, she also described the main limitation preventing Mr. Cross performing the critical demands of an industrial painter as not being to be able to repetitively use his left arm due to shoulder dysfunction, his strength limitations and his limitations for repetitive bending. She opined he has decreased work endurance and reports ongoing headaches. While repetitive bending may be related to low back issues which may be affected by the accuracy of Ms. Szarkiewicz's understanding about the timing of the post functional capacity evaluation back spasms (as opposed to pain flare up), the other evidence that I have accepted leads to no doubt that the other limitations she described exist.

[291] I also note that Ms. Szarkiewicz's comment that Mr. Cross has a structural injury to his shoulder has been overtaken. That is to say Dr. Hawkeswood no longer is of the view that there is a probably structural injury to Mr. Cross shoulder. On the other hand, there is no evidence that I have accepted that Mr. Cross' shoulder injury is going to improve and so Ms. Szarkiewicz' assumption, that his shoulder injury is chronic, is supported by the evidence.

[292] I conclude that Ms. Szarkiewicz' findings are not completely undermined by her misunderstanding as to the timing of the low back spasms, as compared to the flare up of low back pain, after the functional capacity evaluation. Since she

identified left shoulder dysfunction as a primary issue, and that is not affected by that issue, her opinions remain helpful.

[293] The evidence of Mr. Cross' co-workers is relevant and compelling about Mr. Cross' future as an industrial painter at Seaspan and is more compelling than the expert evidence. Based on the evidence of his co-workers, it is not that Mr. Cross is struggling to perform his work at the required level, he is not consistently performing at the required level. According to Mr. Lauzon, Mr. Cross will be among the first to be laid off the next time there is a shortage of work.

[294] The evidence demonstrates that Mr. Cross feels compelled to keep working and to take what overtime he is offered because his occupation is superior means of earning income, especially overtime, and he is responsible for supporting his family. The combination of work that triggers and exacerbates pain, and the weekly need to engage in rehabilitation at the gym or at physiotherapy is such that when he is not working, Mr. Cross is not engaging with his family to the level that he and Ms. Bowles expect.

[295] In *Henry v. Fontaine,* 2022 BCSC 930 at para. 98, Justice G.C. Weatherill described the conclusion that constant and continuous pain will take a toll over time, having a detrimental effect on a person's ability to work, as a "matter of common sense", citing *Morlan v. Barrett*, 2012 BCCA 66 at para. 41. This is similar to the wear down effect that Dr. Hawkeswood testified about.

[296] The evidence as a whole supports the concern expressed by Ms. Bowles that "something has to change" and that something has to be that Mr. Cross finds work that does not trigger pain, headaches and migraines.

[297] I conclude that the evidence readily passes the threshold of a potential future event of an event that will income loss because of future days to be taken off to manage pain, less opportunities to earn overtime, greater likelihood of being laid off, or burning out from pain to the point that Mr. Cross finally decides that he needs to do different work for which he has to retrain.

Step 2: Real and Substantial Possibility of a Future Pecuniary Loss

[298] The plaintiff must prove a real and substantial possibility of a future pecuniary loss. The threshold at this stage "is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative": *Gao v. Dietrich*, 2018 BCCA 372 at para. 34; *Ploskon-Ciesla* at para. 15; and *Rab* at para. 47.

[299] From *Rab* at paras. 60–62, *Dornan* at paras. 67 and 119–120, *Ker* at paras. 50–51, and cases cited in those decisions, a list of factors relevant to determining whether there is a real and substantial risk of pecuniary loss emerge, including: the plaintiff's intention to keep working and what they intend to do; inability to devote the same energy or hours to a pre-accident occupation; evidence of the affect that the injury had on work after the accident; work history; and medical evidence.

[300] Mr. Peaker argues that Mr. Cross is likely to continue working at Seaspan earning what he has always earned, and using his unpaid vacation, if necessary, to manage his symptoms. Mr. Peaker argues that the evidence shows that Mr. Cross has actually taken very few days off and this is evidence that he can do the work. Mr. Peaker also points to the argument that Mr. Cross needs to work financially, and in order to retrain to earn equivalent or nearly equivalent money, Mr. Cross would have to go to school. Mr. Peaker points to Mr. Cross' evidence that he is not good at book learning and so the reality is that Mr. Cross will not leave Seaspan to do that. Instead, he will continue to work at Seaspan because he is able to.

[301] Based on the same reasoning I have set out above, I am of the view that the evidence demonstrates a real and substantial possibility that if Mr. Cross continues to work as an industrial painter at Seaspan, he will experience losses due to unpaid time off work to manage his pain. The evidence also demonstrates a real and substantial possibility that he will be offered less overtime that he would have if he could work at his pre-accident capacity. The evidence demonstrates a real and substantial possibility that if Mr. Cross keeps working, he will be laid off when work is

thin and may not be recalled. The evidence demonstrates a real and substantial possibility that Mr. Cross will leave the heavy physical work of an industrial painter and retrain to do work that he can sustain.

Step 3: Assessing the Value of the Future Loss

[302] There are two approaches to quantify loss of future earning capacity, the earnings approach and the capital asset approach: *Davies v. Penner*, 2023 BCCA 300 at para. 28; and *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The earnings approach is often used where the plaintiff had an established earnings pattern or career trajectory prior to the accident, and after the accident the plaintiff continued to work in the same position with either reduced hours or modified duties, or took early retirement from that position as a result of accident-related injuries, such that the loss is readily measurable: *Lamarque v. Rouse*, 2023 BCCA 392 at para. 38; and *Perren* at para. 32. Where the evidence does not permit measurement of the loss by comparing an established pre-accident earnings trajectory with a reasonably established post-accident earnings trajectory, the capital asset approach is more appropriate: *Perren* at para. 12. That can include where the plaintiff continues to work at pre-accident employment despite a demonstrated loss of capacity.

[303] Although the earnings approach is more mathematical, both approaches are a matter of judgment, not “mere calculation”: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18. Nevertheless, the available economic evidence must be used: *McKee v. Hicks*, 2023 BCCA 109 at para. 83 and the trial judge must still explain the factual basis of the award: *Dornan* at paras. 151, 158.

[304] At para. 80 of *McKee,* Justice Marchand (as he then was) described the approaches set out in para. 43 of *Pallos v. Insurance Corp of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.) as acceptable. This includes the approach of awarding a couple of years of income loss to a plaintiff where the capital asset approach is appropriate and the circumstances are such that one has very little other than a crystal ball to go on.

[305] Finally, both positive and negative contingencies should be taken into account in the analysis.

[306] Mr. Cross is of the view that in this case, the earnings approach is appropriate because Mr. Cross had an established career trajectory, and his losses can be calculated knowing the value of his pre-accident career trajectory. Mr. Peaker asserts that the capital asset approach must be used, and if any loss is established, it should be based on one year of earnings, which is $105,000.

[307] I am of the view that the capital asset approach is more appropriate because although there is good evidence of career trajectory and earnings absent the accident, the evidence of what Mr. Cross will do in the future does not reasonable permit a future earnings trajectory. As I have explained above, although I have that evidence easily passes the threshold of a real and substantial possibility of a future loss, the exact way that will occur is not clear.

[308] I do not agree with Mr. Peaker that the approach of one or two years of wages is appropriate. This is not a case where there is so little to go on that one has to resort to that approach.

[309] In this case, the basic scenarios that could play out taking into account the accident are:

a) Mr. Cross works the rest of his career at Seaspan, but continues to take unpaid time off and does not work as much overtime;

b) Mr. Cross stops working at Seaspan either because he decides to retrain for less physical work or because Seaspan lays him off and does not call him back to work. Under this scenario, Mr. Cross could retrain to become a social worker or for some less physical work. On the evidence, a retraining scenario would likely take about three years given that Mr. Cross would need to upgrade some of his existing education to enter, for example, a two year course of studies to become a social worker.

[310] The real challenge in assessing the scenarios is assigning probabilities to which is likely to occur, and with regard to Scenario B, when it would occur and what Mr. Cross' earnings post-Seaspan would be.

[311] If Scenario A occurs, Mr. Cross will lose time off due to taking unpaid vacation to manage his injuries and a loss of overtime. With regard to unpaid absences from work, the annual average for the years 2022 and 2023, and 2024 to July 31 is 137 hours per year. At that average, Mr. Cross will lose $167,622, assuming he would have stayed at the journeyman rate instead of being promoted to charge hand. In addition, he will lose an average of an additional 143 overtime hours per year, at a value of $352,720, for a total loss of $520,342. This scenario, which is essentially the status quo continuing until retirement, demonstrates how the submission of Mr. Peaker that there is no loss but if there is, it should be value at one year of earnings in the amount of $105,000, cannot be accepted.

[312] If Scenario B occurs, Mr. Cross' future lifetime earnings at Seaspan will be replaced with earnings after he retrains, or earnings of work he takes without retraining.

[313] With regard to Mr. Cross' without accident earning capacity at Seaspan, Mr. Coleman's tables allow losses to be calculated to his age 75. The tables that apply likely participation in the workforce apply a factor that the closer Mr. Cross is to age 75, the less likely he is to participate in the workforce. I consider it highly unlikely that Mr. Cross would have worked past age 65 had the accident not occurred. Despite his high work drive and ethic, on the evidence by age 65 he would have maximized his pension. It is a very physically demanding job and by age 65, Mr. Cross would have been working at it for 45 years.

[314] It is possible to calculate Mr. Cross' earnings to age 65 based on his 2023 earnings and adding the amount that he could have earned for overtime in excess of the 107.5 hours he actually worked that year.

[315] With regard to overtime over Mr. Cross' working career, I do not consider it reasonable to assume that the current "top guy" amount of around 360 or 400 hours per year would have been offered to Mr. Cross or he would have worked those hours, year in and year out, to his age 65. The evidence shows that the amount of overtime offered to the top guys has ebbed and flowed since 2018. Mr. Lauzon testified that although, as a charge hand, he can work as much overtime as he wants, he does not work as much as he could anymore because he does not want to. If one assumes that during the post accident period of approximately 40 years there would be times when 400 hours were available, times when 300 hours were available, times when 200 hours were available, and times when Mr. Cross only wanted to work 100 hours regardless of what was available, a reasonable yearly average of overtime is about 250 hours.

[316] Mr. Coleman also assumes that had the accident not occurred, Mr. Cross would have been promoted to charge hand effective January 1, 2028. Based on the evidence of Mr. Lauzon, this is a reasonable assumption, although it is subject to assessment for contingencies.

[317] At 107 hours of overtime, Mr. Cross' earning capacity to age 65 is $2,789,464. To that, I add 143 hours of additional overtime per year, which is $352,720, for a total life time earnings of $3,142,185.

[318] Mr. Coleman provides several calculations of Mr. Cross' possible earnings if he leaves Seaspan, based on the lifetime earnings of an industrial painter who works elsewhere and earns average earnings, someone who takes three years to retrain and enters the workforce as a social worker or earns the average earnings of a person with a 1-2 year diploma.

a) Industrial painter generally, not at Seaspan: $1,608,062 working to age 65, and $1,676,982 working to age 75 (not lagged).

b) Social worker, lagged by 5 years, starting in September 2027: lifetime earnings of $1,294,366 to age 65, and $1,359,679 to age 75.

c) Average earnings of male with an 1-2 years diploma education level, starting in September 2027, with five years earnings lag: $1,995,780 to age 65, and $2,087,706 to age 75.

[319] These illustrative calculations could be considered sub-scenarios under Scenario B. They all have some basis in the evidence.

[320] With regard to a), when Mr. Cross was laid off from Seaspan, he went and worked as an industrial painter elsewhere. He earned less, but also worked less hours and found he could manage his symptoms better.

[321] However, the evidence demonstrates that Mr. Cross' attachment to his current work is not just an attachment to being an industrial painter. He has an attachment to Seaspan because his father worked there, his sister works there, because of the teamwork and skill involved in stripping and repainting military and commercial vessels, because he excelled at the work and because of the superior money he can make there. I conclude that it is likely that if he decides to leave Seaspan, he will leave industrial painting for something that is not as hard on his physical well being. Mr. Cross has indicated an interest in becoming a social worker, and has investigated that option.

[322] The evidence shows that average earnings with a 1-2 year diploma are higher than the average earnings of a social worker. Mr. Cross is both hard working and highly motivated by earnings. He may look around and find work that he can do to earn more money than he could doing the same amount of retraining that would result in him becoming a social worker. That is illustrated in sub-scenario c).

[323] I do not accept Mr. Cross' submission that there is a possible scenario that if he leaves Seaspan, or is laid off, he might only earn minimum wage. On the evidence as a whole, Mr. Cross is highly motivated to earn a good living to provide for his family. Despite that he struggles with book learning, he got through the industrial painter apprenticeship coursework. He currently earns far more than the average person with his level of education and post secondary training.

[324] The sub-scenarios under Scenario B yield a range of working lifetime (to age 65) and result in losses of between $1,146,405 and $1,847,819. If he works at one of the sub-scenarios to age 75 to make up for lost time and earnings, the losses will be $1,054,479 to $1,782, 502.

[325] I am of the view that Scenario A is much less likely than Scenario B. I would estimate Scenario A to be a 33% likelihood and Scenario B to be 67% likely.

[326] At these likelihoods, and the midpoint of the age 65 losses under Scenario B, the blended probabilities result in losses of about $1,180,000.

[327] However, there are many possibilities of other sub-scenarios under Scenario B that I have not considered. A major question is timing: these numbers are based on Mr. Cross undergoing retraining, if he does, starting in September 2024. That assumption was driven by the trial date. It obviously did not occur, and there is a question of when it will occur. Once Mr. Cross has his damages from this trial, he may feel financially stable enough to undertake the retraining. Nevertheless, his commitment to the work of an industrial painter at Seaspan may compel him to keep trying until he cannot try any more or he is laid off. The longer Mr. Cross stays with Seaspan, the lower his losses.

[328] If he makes the decision to leave or is forced out due to lay off, there are many permutations of what he could do, how long his retraining will take if he retrains, and what he will do and earn once he retrains. These further sub-scenarios and permutations demonstrate why the capital asset approach is necessary. While it is possible to start with a mathematical approach, it is not practical to assess all the possible permutations and sub-scenarios mathematically.

[329] My impression of the evidence on this issue overall, given Mr. Cross' age, his pre-accident earning capacity doing very physical work, his post-accident efforts, the nature of his post accident pain, and his disadvantages if he is required to undertake formal studies, is that his future earning capacity has been diminished by about one third. That would be a loss of about $1,050,000. That compares fairly well with the

analysis above. I assess his loss of earning capacity at $1,100,000, before considering contingencies, to which I now turn.

[330] Positive contingencies relating to Scenario A, and making it more possible, are that Mr. Cross is permitted to keep working lighter duties at Seaspan, undergoes counselling that improves his mental heath and has a positive influence on his physical health which permits him to keep working without taking as much time off, and/or working more overtime.

[331] Positive and negative contingencies under either scenario are that I have overestimated or underestimated the overtime that would be available had the accident not occurred.

[332] A major positive contingency relating to Scenario B is that Mr. Cross continues to working at Seaspan for a period of time before being laid off or deciding to leave and retrain. Another positive contingency is that regardless of what work he does when he leaves, he earns more than average. That is a likely positive contingency, given his history of earning more than workers of his education.

[333] Negative contingencies are most related to Scenario B. They are that Mr. Cross' symptoms worsen, as they evidence indicates they have been, causing him to be laid off sooner or limiting how much work he can do, and what he can do once retrained.

[334] Overall, I am of the view that there are more positive contingencies than negative, and I would adjust the award down by 15% for contingencies.

[335] I assess the loss of future earning capacity at $935,000.

Cost of Future Care

[336] Mr. Cross is entitled to compensation for costs of future care based on what is reasonably medically necessary to restore him to a position as though the accident had not occurred by preserving and promoting his mental and physical health: *Milina*

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

[337] Awards of cost of future care ought not be made for treatments or services that the plaintiff will not use: *Milina* at para. 84; and *Brewster v. Li*, 2013 BCSC 774. However, an item that the plaintiff has not previously used may be the subject of an appropriate award if it is reasonably necessary and likely to be incurred in the future: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253

[338] Like other awards for expenses that may occur in the future, they are subject to adjustments for contingences: *Gilbert* at para. 253.

[339] Mr. Cross relies on the report of Ms. Szarkiewicz, who reviewed the medical records, noted recommendations that physicians have made, and made her own recommendations.

[340] Mr. Peaker asserts that the court cannot rely on Ms. Szarkiewicz's report because of the issue of low back pain that I have already discussed. However, Mr. Peaker does not relate his assertion that Ms. Szarkiewicz's report cannot be relied upon to any specific recommendation; rather his submission seems to be that the low back pain issue affects the reliability of every opinion and recommendation in her report. I do not see how the issue affects her identification and costing of future care needs. Absent a focussed submission on that issue, the submission does not go anywhere.

[341] Mr. Peaker also takes issue with specific recommendations. Mr. Peaker asserts that a fair award is $5,000. However, he did not link that amount to his broad submission about the unreliability of the report or relate the $5,000 submission to the issues raised about certain items for which an award is sought. I will address the specific issues, but I will not address the $5,000 submission as it is was not linked to evidence or law.

One Time Costs

[342] Certain recommended items are one time costs or costs that will not recur year after year.

[343] Dr. Hawkeswood recommended an arthrogram MRI of Mr. Cross' shoulder. By the time of the trial, Mr. Cross had different further investigations of his shoulder, and although Dr. Hawkeswood said the arthrogram MRI is the gold standard to rule out a structural injury, he was satisfied there is no structural injury. Accordingly, I do not allow an amount for this procedure.

[344] The next is Botox injections for Mr. Cross' shoulder and upper back. This was recommended by both Dr. Hawkeswood and Dr. Leith. Dr. Hawkeswood recommended 10 sessions. Dr. Leith did not make a recommendation for a number of sessions but opined that it should not be indefinite. I award the lower range, $13,050, as it is based on treatments in Duncan, which is where Mr. Cross lives, and the higher costs are based on treatment in Nanaimo.

[345] With regard to prolotherapy, Dr. Hawkeswood, and a treating physician, Dr. McKean, have recommended this type of approach in slightly different areas than Mr. Cross previously underwent. Dr. Hawkeswood opined that this will offer temporary relief and 15 injections would be appropriate. The total cost ranges from $1,200 to $2,325. Mr. Cross sought a number in the middle without any specific submission on the difference between the numbers. I award $1,200.

[346] Mr. Cross has been seeing a kinesiologist since shortly after the accident. Dr. Hawkeswood recommended continued exercise with some different exercises and foci than Mr. Cross presently does. He also suggests a gradual discontinuance of kinesiology supervision because Mr. Cross can engage in independent exercise. Mr. Cross has claimed 36 sessions over the next 18 months to gradually discontinue. In my view, this is excessive. I award $1,035 which will cover 12 further sessions to incorporate the exercises that Dr. Hawkeswood recommended.

[347] Dr. Hawkeswood recommended the services of either an occupational therapist or a psychologist for counselling on pain management. I am of the view that there is no evidence that further work with an occupational therapist will be useful. Mr. Cross has had an assessment by Ms. Szarkiewicz, and he has her recommendations. With regard to psychological intervention, based on the evidence that Mr. Cross may be able to develop the ability to better manage his pain with the assistance of a psychologist with experience in pain management, the evidence that Mr. Cross' mood is interfering with his work and personal relationships, and Dr. Hawkeswood's view that an improvement in mood could result in a small but significant improvement in his overall wellbeing, I allow this at the mid range of the costing for 12-20 sessions, $3,160.

[348] Ms. Szarkiewicz recommended a vocational assessment, vocational counselling, and vocational retraining. With regard to vocational assessment and vocational counselling, the evidence demonstrates that these are warranted. Mr. Cross is struggling at Seaspan. He has not left for reasons that include that he cannot afford to retrain, the work there offers compensation that is difficult to replicate elsewhere, and he is attached to the work because of his family legacy and the pride he took in the work before the accident. He is coming to the view that he should retrain. He has identified social work as an option because he knows people that have been affected by the opioid crisis and he would like to help. This may or may not be realistic. The schooling necessary is a deterrent to him. With a vocational counselling and assessment, he will have tools to determine whether social work is a good match or not a good match, and he may learn about methods to address what he perceives as his challenges with book learning, or he may decide that he should pursue retraining in another field.

[349] In addition, my assessment of future loss of earning capacity demonstrates that a career in social work will leave a significant differential between Mr. Cross' Seaspan earning capacity and what he will earn if he retrains. The award I have made does not completely bridge this gap. It is appropriate to provide Mr. Cross the

means to explore what route he wishes to take with his career given his situation at Seaspan.

[350] Mr. Peaker submitted that a vocational assessment and vocational retraining are not appropriate and the amounts claimed are excessive. He did not relate this submission to the evidence. The vocational assessment ranges from $3,500 to $5,000. Mr. Cross did not submit why the low or high amount was appropriate. I award $3,500 for a vocational assessment. The vocational counselling ranges from $2,140 to $3,000. Again, there was no specific submission as to where in that range the award should be. I award $2,140 for vocational counselling.

[351] With regard to vocational retraining, there is a very large differential between the low and the high depending on what type of retraining Mr. Cross undergoes. Mr. Cross is not suited for heavy physical labour and that is all he has been trained to do. I think it is unlikely he will undertake a lengthy academically oriented period of training. I award $10,000 based on the assumption that a two year course leading to a diploma or a different trade is likely. This is less than the estimated costs of such a program. I have reduced the reward to reflect the chance that he may not retrain or his retraining may be less expensive.

[352] Mr. Cross seeks a one time award of $1,000 for assistive aids. He did not testify about needing anything nor confirm that he would use something Ms. Szarkiewicz recommended. I make no award.

[353] I award $34,085 for one time future care costs.

Periodic Future Care Costs

[354] A number of medications are on the list. Of those, the only ones that Mr. Cross testified that he takes at this time are amitriptyline and Advil. The reports mention that he uses marijuana to relax and treat his pain, but this is hearsay not supported by his evidence. Some medications are for him to try to treat depression and/or anxiety. Mr. Cross has not been diagnosed with those. Dr. Hawkeswood recommended a “rescue” medicine for migraines. Mr. Cross testified that his

migraines are much better since he started taking amitriptyline. He has had Dr. Hawkeswood's report since March 2024 and has not pursued a migraine rescue medication. He did not testify about whether he would take such a medication. Mr. Cross also has not pursued medication for anxiety or depression during that timeframe. Given the evidence as a whole, I conclude it is not likely he will take these medications and I do not make an award for them.

[355] I allow the ongoing costs of amitriptyline and Advil. That amounts to $1,461.

[356] Dr. Hawkeswood recommended ongoing physiotherapy but at reduced frequency from what Mr. Cross is currently doing. Mr. Cross has used physiotherapy and testified that he will continue to attend. Based on Dr. Hawkeswood's recommendation, I award $34,880 based on one session per month while working and one session every other month after retirement at age 65.

[357] There is a recommendation for a moist heat pad to be replaced every two years. Mr. Peaker does not object to this and it appears reasonable. The present value of this $527 and I allow it in this amount.

[358] Ms. Szarkiewicz recommended allowances for cleaning aids, a robot vacuum, regular household cleaning, heavier seasonal cleaning. The evidence was that Mr. Cross and Ms. Bowles planned that she would do the interior housework and he would do the exterior. They agreed that he would pick up after himself inside and do his own laundry and lunch preparation. There is no evidence that Ms. Bowles is doing interior work that Mr. Cross would have done but for his injuries. While there is evidence that she is not getting the support she wants from him with regard to spending time with K.J., the claim for interior cleaning is not supported by the evidence. Nor is the claim appropriate given the position that the loss of housekeeping services should be addressed as part of non-pecuniary damages.

[359] This latter point also applies to the recommendations for yard and garden assistance and house maintenance. Given that Mr. Cross asked that loss of

housekeeping be assessed as part of his non-pecuniary damages and I have done so, I will not make another pecuniary award for these losses.

[360] Ms. Szarkiewicz recommended child care for Ms. Bowles to have some relief. The recommendation is based on Ms. Szarkiewicz's opinion that Ms. Bowles is burning out and needs some respite. Apparently, Ms. Bowles reported to Ms. Szarkiewicz that she would like K.J. to be around small children. Ms. Bowles' mother and step father help out a couple of days a week which is a very common family practice when children are under school age.

[361] I agree with Mr. Peaker that this recommendation does not address an accident caused problem. There is no evidence that Mr. Cross' accident injuries are such that child care services are required or preventing arrangements for K.J. to have more time with other children. Ms. Bowles testified that what she would like is Mr. Cross to engage with K.J. in the evenings when he comes home, but he is too tired and too irritable. This is an accident issue, but it will not be addressed by having someone else look after K.J.

[362] I decline to make an award for child care.

[363] The total award for periodic costs of future care is $36,868.

Total Future Care Costs Award

[364] The total award for costs of future care is $70,953.

Special Damages

[365] It is well-established that an injured person is entitled to recover the reasonable out-of-pocket expenses he or she incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X. v. Y.,* 2011 BCSC 944 at para. 281; and *Milina* at 78.

[366] The parties agree that Mr. Cross has incurred special damages relating to treatment and care in the amount of $9,174.00. The parties agree that of this total, $6,874.32 is for transportation to the appointments.

[367] Mr. Peaker disputes that the transportation claim is unreasonable for several reasons, including that it is claimed at $.60 kilometer, and that Mr. Cross had no additional travel expenses for attending the appointments because they were on his way to or from work or were by telehealth.

[368] With regard to the per kilometer cost, Mr. Cross has not explained why he claims $.60. In *Ponych v. Klose*, 2023 BCSC 1504 at para. 343, Justice Blake cited Justice Basran's summary of the applicable principles in *Manhas v. Jaswal*, 2020 BCSC 586 at para. 86, setting $.50 as a reasonable rate. I reduce the travel costs by $.10 per kilometer, making the award $7,645.

[369] Mr. Peaker's argument that Mr. Cross should be not compensated for travel to the appointments because they were on the route between Mr. Cross' home and work, or were by telehealth, is not supported by evidence. During cross examination, Mr. Cross was asked where the various providers were, but it was not put to him that he attended some or all of the appointments on his way to or from work. Mr. Cross agreed that he had appointments by telehealth during the pandemic, but there is no evidence that those are among the appointments for which travel costs are claimed.

[370] In addition, Mr. Cross claims an in trust award for his mother. They both testified that around the time of the accident, she was readying her house, where Mr. Cross lived, for sale. He generally did the outside work and had agreed to do some repairs to the house before it was put on the market. He could not do these things due to his injuries and she had to hire others to do it at a cost of $4,000. I consider this an appropriate in trust claim and award it.

Summary of Damages and Costs

[371] In summary, I award the following:

Non pecuniary damages	$195,000
Past loss of earning capacity	$151,800
Future loss of earning capacity	$935,000
Future Cost of Care	$70,953
Special Damages	$7,645
In trust for Heather Cross	$4,000
Total	**$1,364,398**

[372] Subject to matters of which I am not aware, I award Mr. Cross costs at Scale B. If the parties wish to address costs, within 30 days of these reasons they shall arrange for a date. The party seeking an award different from my provisional award shall deliver written submissions to the other party within 30 days of these reasons. The responding party shall deliver written submissions to the other party within 45 days of these reasons. A week prior to the hearing before me the submissions shall be delivered to me with a joint brief of authorities.

"Matthews J."