

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gordica v. Mainroad Lower Mainland Contracting Limited Partnership*,
2025 BCSC 1459

Date: 20250730
Docket: M215326
Registry: Vancouver

Between:

Bradley Darren Gordica

Plaintiff

And

**Mainroad Lower Mainland Contracting Limited Partnership, John Doe,
Insurance Corporation of British Columbia and His Majesty the King in Right
of the Province of British Columbia on Behalf of the Ministry of
Transportation and Infrastructure, and Mainroad Transtronic Services
Limited Partnership**

Defendants

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment

Counsel for the Plaintiff:

K.F. Gourlay
P. Bosco

Counsel for the Defendants:

D. Shugarman
C. Geiger

Place and Date of Trial:

Vancouver, B.C.
January 20-24, 27-31,
February 3-7, 2025

Place and Date of Judgment:

Vancouver, B.C.
July 30, 2025

Table of Contents

INTRODUCTION

WITNESSES

ISSUES

BACKGROUND

[Accident Evidence](#)

[Leadup to the Accident](#)

[George Massey Tunnel](#)

[Lane Control System and Procedures](#)

[Incident Management Strategy](#)

LIABILITY

[Tort of Negligence](#)

[Parties' Positions](#)

[Application](#)

[Relevant Findings of Fact](#)

[Standard of Care Analysis](#)

[Conclusion on Liability](#)

DAMAGES

[Medical Evidence](#)

[Vocational Review](#)

CAUSATION

ASSESSMENT OF DAMAGES

[General – Non-Pecuniary](#)

[Special Damages](#)

[Cost of Future Care](#)

[Income Loss and Earning Capacity](#)

[Future Income Loss and Earning Capacity](#)

[Loss of Trust Income Benefits](#)

[Loss of Pension Benefits](#)

CONCLUSION

Introduction

[1] These reasons deal with a claim for compensation arising from a single car accident that occurred on December 18, 2019, shortly before 9:00 p.m. The plaintiff was driving southbound on Highway 99 in his 2017 Chevrolet Volt at approximately 80 km/hr, just north of the George Massey Tunnel (the “GMT”) near the Steveston Highway overpass, roughly a few hundred meters before the tunnel, when a mechanical arm at one of the gates, Gate 2C, used to control counterflow traffic struck and shattered the windshield of the plaintiff’s vehicle (the “Accident”). The counterflow lane at the time was not closed to traffic. The plaintiff was not struck by the gate arm and his car came to a stop without striking any other object. The airbags also did not deploy.

[2] This action was commenced October 13, 2021. The Notice of Civil Claim has been amended twice.

[3] The plaintiff asserts that the defendant, Mainroad Lower Mainland Contracting Limited Partnership (“Mainroad”), was negligent in not taking sufficient measures to protect against the mechanical gate arm striking the plaintiff’s vehicle.

[4] The plaintiff’s theory is that the break away section of the arm of Gate 2C was broken by easterly winds, causing it to swing into the lane in which Mr. Gordica was travelling. Important to the plaintiff’s case is that an hour before the Accident, Gate 2B, located about 65 metres north of Gate 2C, was reported by a member of the public as being “down” in the fast lane and impeding traffic. That gate was tied back by Mr. Perra, a Mainroad road maintenance wrecker operator (a “Massey 25 Operator”). The plaintiff contends that Mr. Perra ought to have tied back Gate 2C at the same time and in not doing so was negligent.

[5] The plaintiff says he suffered injuries from the Accident which ultimately caused him to stop working and cease being an equity partner at Deloitte as an international tax accountant, a career by which he earned substantial income. He claims damages under all the usual heads totalling \$9,005,892. A significant portion of the damages relates to the loss of income.

[6] The defendants do not assert that Mr. Gordica’s driving was deficient or contributed to the Accident; however, they deny liability and describe Gate 2C’s

presence in the lane of travel as a “freak” occurrence. They also argue that Mr. Gordica’s injuries from the Accident were relatively minor; and that his complaints of being unable to continue with his career are the result of his decline from pre-existing conditions he has had for years prior to the Accident. One of these pre-existing conditions was Adult Attention Deficit Hyperactivity (ADHD), a condition for which he had taken medication for about nine years prior to the Accident—medication he ceased taking a short time prior to the Accident without consulting his treating physicians, and has not resumed since.

[7] While the defendants are listed as: Mainroad; Insurance Corporation of British Columbia; His Majesty the King in Right of the Province of British Columbia on Behalf of the Ministry of Transportation and Infrastructure; Mainroad Transtronic Services Limited Partnership; and John Doe, plaintiff’s counsel confirmed that the case presented was focussed solely upon Mainroad and its Massey 25 Operator on duty at the time, Mr. Perra. No liability evidence was led against the Province or Mainroad Transtronic. The third party claim against ICBC has been discontinued.

[8] Mainroad denies liability. Its position is that it conducted itself in accordance with the Maintenance Agreement, which sets the standard of care for Mainroad. The other defendants did not assert that Mainroad’s conduct, including that of Mr. Perra, was not in conformity with the Maintenance Agreement or negligent.

[9] Should liability be found, the defence’s position is that the injuries suffered were predominantly non-Accident related, minor and unrelated to the plaintiff’s ability to work.

[10] The defendants submit that if liability is found as well as a causal connection between the Accident and the plaintiff’s injuries, that damages should be a total of \$77,500 (plus \$8,000 of agreed special damages).

[11] For the reasons that follow, despite the most unfortunate circumstances of the gate arm striking the plaintiff’s car and smashing its windshield—a situation in which Mr. Gordica played no role in causing—I am unable to find liability against Mainroad.

[12] As per the request of plaintiff’s counsel that even if liability is not found, I have provided my determination of causation and the assessment of damages.

Witnesses

[13] The witnesses in the plaintiff's case were:

- a) Bradley Gordica – the plaintiff;
- b) Gabriela Gordica – wife of the plaintiff;
- c) Dr. Christopher Ryan – the plaintiff's family physician since 1979;
- d) Dr. Lisa Caillier – expert witness in physical medicine and rehabilitation;
- e) Joseph Perra – Massey 25 Operator who was on duty the evening of the Accident. He had been a Mainroad Massey 25 Operator for about 3 years;
- f) Dr. Soma Ganesan – expert witness in psychiatry and impact of psychiatric injuries arising from traumatic events including motor vehicle accidents;
- g) Neil Pogany – tax accountant and a co-worker of the plaintiff. He testified to his relationship with and observations of the plaintiff;
- h) Hanna Gordica – the plaintiff's eldest child;
- i) Olivier Labelle – national leader for international tax for Deloitte, who testified to the nature of the plaintiff's practice, his relationship with the plaintiff, financial aspects of the organization and potential options for the plaintiff at the firm;
- j) Darren Benning – expert witness for economic evidence;
- k) Philippe Montillaud – national leader of mergers and acquisitions for Deloitte. He spoke to the nature of the work involved, his relationship with and observations of the plaintiff;
- l) Susan Fikart – senior manager of international tax with Deloitte and a member of the team formerly led by the plaintiff. She spoke to the nature of the work involved, her relationship with and observations of the plaintiff; and

m) Margherita Bracken – expert witness vocational consultant. She provided a limited scope report dated October 22, 2024. This entailed a records review and a three-and-a-half hour video conference interview. A full functional capacity assessment was not conducted.

[14] The witnesses in the defence case were:

- a) Darren Ell – General Manager of Mainroad Lower Mainland Contracting, Area 6. He has been in that position for 13 years, having been employed at Mainroad for about 30 years;
- b) Dr. Todd Bentley – expert witness physiatrist;
- c) Wade Senft – retired, former senior console operator at Mainroad. He had worked for approximately 30 years in that position until retirement in October 2024;
- d) Dr. Philip Teal – expert witness in neurology and emergency medicine;
- e) Dr. Paul Latimer – expert witness psychiatrist;
- f) Sergey Pivnenko – expert witness economist;
- g) Chris Roberts – Mainroad Transtronic Electrical Supervisor at time of the Accident. He retired in 2022. He had been Electrical Supervisor for seven to eight years for Mainroad. Prior to that he was a highway maintenance electrician on Vancouver Island for close to 30 years;
- h) Randall Hayward – Massey 25 Operator. He was on duty at the GMT on the morning shift on December 18, 2019. He worked on the infrastructure as work crew and then as a Massey 25 Operator for approximately 12 years;
- i) Jacqueline Nelson – Mainroad Lane Control Operator at the Regional Transportation Management Center (“RTMC”) in Coquitlam, B.C., on duty on the evening of December 18, 2019. She has been on leave since February 2023; and

- j) Grant Smith – Ministry of Transportation and Infrastructure, Operations Manager for Service Area 6 which deals with all major highways leading into the Lower Mainland, including the GMT and Highway 99. He was responsible for the safety of users of the highway system. He began his management role in this area in 2016. His office was located in the same space as Mainroad and the company that had the contract to maintain the Lions Gate Bridge infrastructure. He has been with the ministry since 1985.

[15] An agreed statement of facts has also been tendered.

Issues

[16] The main issues in this action are:

1. Did Mainroad meet the standard of care required in the circumstances?
2. What are the plaintiff's damages if liability is found?

[17] The plaintiff's theory of negligence is that at the time of the Accident, the control arm of Gate 2C was to be in the fully retracted position (allowing the southbound fast lane to be open); that an easterly wind caused the shear pin that holds the two parts of the control arm together to break, therefore resulting in the free part of the arm to swing into the lane of travel of Mr. Gordica and strike his windshield. The specific failure asserted is that Mr. Perra, the Massey 25 Operator who had earlier tied back Gate 2B because it was down and impeding traffic in the fast lane, failed to tie back Gate 2C about 65 meters south of the gate he attended, Gate 2B, given the wind.

Background

[18] The plaintiff was and is a certified public accountant who specializes in international tax. At the time of the Accident and until January 20, 2023, he was an equity partner with Deloitte and remained so until January 20, 2023, when he ceased to work. He remains off work.

[19] He is married and has three adult children. At the time of the Accident he was 53 years old. At the time of trial, he was 58 years old.

[20] He worked the day after the Accident. Although the office was closed for the subsequent holiday break, he still worked a few hours during that time. In the new year he returned to work fulltime despite neck, shoulder and upper back pain. When his office shut down due to the pandemic, he worked remotely from his home.

[21] He continued working until January 20, 2023, and went on short term disability leave with benefits. He went on long term disability leave on July 23, 2023, and receives \$20,000/month on a non-taxable basis.

[22] The rule at Deloitte requires a partner to retire at age 62. For Mr. Gordica this would be the end of May 2029. He is also entitled to a pension from Deloitte.

[23] Mr. Gordica and his wife sold their large home in Langley and moved to a much smaller home in Mill Bay, which is near Shawnigan Lake on Vancouver Island. They moved there in October 2023. Their reasons were to downsize and to live in a quieter community. Also, Mrs. Gordica's parents and brother lived close by. Her parents have since passed.

[24] He testified that he would like to return to work as he enjoys it. He says he is unable to do so because of his pain and inability to focus and concentrate for long; and that the more he has to concentrate the greater his headaches are.

[25] The head of the National International Tax Group for Deloitte has indicated a strong willingness to explore Mr. Gordica's return with accommodations once Mr. Gordica is medically approved to return to work.

[26] Mr. Gordica has not discussed with Deloitte his returning to work in a lesser role.

[27] I will now discuss evidence surrounding the Accident.

Accident Evidence

[28] The plaintiff was travelling in the southbound fast lane behind a tractor trailer just before 9:00 p.m. He suddenly saw a flash out of the corner of his right eye and heard a loud boom. This was from the impact of the arm of Gate 2C hitting his car. The gate arm did not strike him but came close when it went through the windshield. Air bags in the car did not deploy. He braked and came to

a controlled stop after a few car lengths. His car did not strike any other objects. He believed he did not strike his head and did not lose consciousness.

[29] Mr. Gordica testified he then did a body scan and decided he was uninjured. He drove forward a few hundred metres to cross the highway over to reach the far-right side partially out of the way of traffic and parked. He called his wife on his cell phone to tell her he had been in an accident. He told her that he did not think he was injured. A call to 911 was made. A tow truck service was called. He put on his hazard lights and exited the car with an umbrella as it was raining quite hard and stood on a grassy area by the highway. He was waiting for about one hour. At one point he returned to his car to retrieve his laptop as it was firm policy against leaving such devices unattended. He also took interior and exterior photos of his damaged car. When the tow truck arrived, the driver told him to call the police because of the extent of the damage to his car. Mr. Gordica contacted the Richmond RCMP who attended the scene. A brief conversation ensued with the officer. It appears no injuries were reported to the officer. The tow truck driver then towed the vehicle and gave Mr. Gordica a ride to the tow yard. Mr. Gordica's brother-in-law came to pick him up and drove him home.

[30] The next day, Thursday, December 20, Mr. Gordica felt sore and felt some pain in his neck and upper back region. He was busy with work and went to his office, where he worked a full day. He worked a partial day the following Friday. He took off most of the holiday break, but put in some hours. He returned to the office January 5 or 6, 2020. From the start of the COVID pandemic, the plaintiff worked remotely from his home with a few visits to the office. He continued to work until January 20, 2023.

Leadup to the Accident

[31] Two days before the Accident, overnight between December 16 and 17, 2019, during a scheduled lane closure, Mainroad Transtronic carried out repairs to Gate 2C after its technician Chris Roberts observed the traffic gate's lights were knocked off and hanging by their wires. He re-bolted the strut onto the gate arm, replaced the light plugs and shear pin, had it tested remotely by the Lane Control Operator, and confirmed the gate to be functional.

[32] During morning counterflow operations on December 17 and 18, 2019, Gate 2C functioned normally.

[33] By 9:28 am on December 18, 2019, following the morning counterflow, the southbound fast lane was reopened to traffic. In the normal course, the southbound fast lane would remain open until the following morning.

[34] At 8:01 p.m. of that same day, RCMP Highway Patrol received a call from a member of the public that one of the traffic gates on Highway 99 southbound, north of the George Massey Tunnel, was “down”, causing traffic to have to go around it. RCMP Highway Patrol advised Mainroad.

[35] Mainroad's electronic logs indicate at 8:17 p.m. on December 18, 2019, they received an initial public communication reporting a traffic gate “down” in the southbound fast lane between the George Massey Tunnel and the Steveston Highway. The communication was forwarded to the Lane Control Operator at the RTMC.

[36] Jacqueline Nelson was the Lane Control Operator who was working that night. She dispatched to the scene the Massey 25 Operator on shift, who was Joe Perra.

[37] Mainroad's records document Ms. Nelson closing the southbound fast lane at 8:21 p.m.

[38] Mr. Perra attended and secured Gate 2B against the barrier using a bungee cord located there, which is the standard procedure for securing gates by the Massey 25 Operators.

[39] Mainroad's electronic logs recorded at 8:22 p.m. a communication from the RTMC (Ms. Nelson) that the traffic gate had been temporarily fixed and would be passed along for repairs.

[40] The RCMP's BC Highway Patrol records documented at 8:26 p.m., Cst. Towns having confirmed with BCE-Comm that they spoke with Mainroad who advised the "traffic gates were up high enough to not interfere with traffic".

[41] Mainroad's records show an entry of the re-opening of the southbound fast lane by Ms. Nelson at 8:31 p.m.

[42] Around 8:50 p.m., the Accident occurred.

[43] Around 8:54 p.m., the Plaintiff called his wife.

[44] Around 8:58 p.m., the Plaintiff called 911.

[45] The RCMP's Highway Patrol records documented at 9:03 p.m. of receiving a call from the plaintiff reporting a traffic gate striking his windshield. The police report indicates that the RCMP were called again and attended around 10:00 p.m. as result of the tow truck driver's view that the damage to the vehicle was over \$10,000.

[46] Mainroad's records documented an emergency closure of the southbound slow lane at 9:23 p.m.

[47] Mainroad's electronic logs recorded at 9:29 p.m. receiving communications from a Massey 25 Operator of a single motor vehicle incident on Highway 99 in the southbound fast lane south of the Steveston Overpass. A tow truck was on scene.

[48] The agreed facts state that at the time of the Accident, it was dark, raining, and windy. I note that "windy" was not defined. No description of speed, direction, variability, whether constant or intermittent at the GMT was provided.

[49] Between 10:00 p.m. and 11:00 p.m., Mr. Roberts of Mainroad Transtronic attended to repair Gates 2B and 2C by replacing the arms. He was driving the company service van. He took photos of his area of work while there.

George Massey Tunnel

[50] The George Massey Tunnel is part of Highway 99, both of which are vested in the Province of British Columbia. It is a critical facility for transportation in BC's Lower Mainland, allowing motorists to easily travel between the various communities on both sides of the southern branch of the Fraser River.

[51] The GMT and Highway 99 together constitute one of the most significant transportation corridors for the Lower Mainland. They are highly managed, maintained and monitored by the Transportation Ministry and Mainroad. In 2019, approximately 30 million motorists travelled through the GMT annually. On

average the daily usage by motorists is about 80,000. The total volume of traffic at the GMT for December 18, 2019 was 88,705 (both directions).

[52] Mainroad is an independent maintenance contractor and does not own the infrastructure and has no authority to modify it. Mainroad was not involved in the design, selection, or installation of the traffic gate system. Mainroad's responsibilities and activities are extensively prescribed by contract, policies and procedures in manuals set by the Province. The contract was entered into in April 2019 and has a term of ten years.

[53] The various documents tendered and testimony of witnesses establish that there is continuous 24/7 monitoring of the infrastructure, including a 50-camera system and patrolling. There are daily inspections, regular preventative maintenance inspections, and quick repairs of mechanical system failures.

[54] Under the contract, Mainroad provided for the GMT:

- a. Console operators, also known as Lane Control Operators, stationed at the RTMC to provide traffic monitoring and/or traffic control 24 hours per day.
- b. Patrol operators, also known as Massey 25 Operators, to provide safe and efficient flow of traffic through the GMT by conducting traffic patrols, standing at point duty for morning and afternoon counterflow traffic, responding to scenes of an obstruction, and removing obstructions from the travelled lanes.

[55] The gate system for traffic counterflow forms part of this infrastructure and has been in place since the 1990s. There are about 30 gates in this system. About half are for lane control for northbound traffic and the other for southbound traffic. Gates 2B and 2C are part of this counterflow system that deal with lane closures for morning counterflow.

Lane Control System and Procedures

[56] Gate 2B has flashing lights and a rectangular chevron sign with the arrow directing traffic to the right out of the lane on the gate arm. Gate 2C has flashing lights and two rectangular chevron signs with arrows directing traffic to the right out of the lane on the arm. As noted above, they are on the northern side of the GMT, located in the southbound fast lane of Highway 99 near the southern side of the Steveston Highway overpass. The Series 2 gates are graduated in length to guide traffic out of the fast lane to allow the lane to be available for northbound

traffic during morning counterflow. Gate 2B is 2.1 metres in length and Gate 2C is 3.2 metres. They are constructed of rectangular aluminum tubing, 2"x4"x1/8".

[57] The traffic gates move horizontally. When they are in the "closed" position, such that the lane is closed for approaching traffic, the gates rotate out approximately 90 degrees from the concrete median barrier. When traffic gates are in the "open" position, such that the lane is open for approaching traffic, the gates rotate back to sit over the concrete median barrier and do not obstruct the travelled portion of the lane.

[58] Counterflow operations occur twice daily, once in the morning and once in the afternoon, the exact timing of which depends on the month of the year. On December 18, 2019, morning counterflow began at 5:22 a.m. and ended at 9:25 a.m., and afternoon counterflow began at 2:58 p.m. and ended at 6:15 p.m.

[59] During morning counterflow, gates are rotated out into the lane to ensure traffic merges out of the southbound fast lane. After morning counterflow the 2 Series gates retract in line with the concrete median barrier, leaving the lane open to southbound traffic.

[60] All gates in the lane control system are electronically controlled by the Lane Control Operator. Each gate is independently operated. To open or close a gate, the Lane Control Operator pushes the appropriate buttons which then activate a mechanism that sits on a concrete barrier where each gate is located. This mechanism controls what is known as a "sleeve". This sleeve straddles a "receiver", which itself sits between the main rotation post and the main arm of the gate. The receiver is attached to the main rotation post by a vertical bolt, and to the actual arm of the gate partially by way of a break-away or "shear" pin.

[61] The vertical bolt is a pivot point. When a shear pin is in place, the gate cannot pivot on this bolt due to the shear pin connecting it to the sleeve. However, if the shear pin is broken or removed, the gate may pivot on the vertical bolt independent of the sleeve. This design of this part of the gate is meant to deal with being struck by vehicles: if a gate is struck, the shear pin which is made of soft metal is meant to break and allows the gate to swing, reducing the force of impact.

Incident Management Strategy

[62] A key aspect of the case involves the steps that a Massey 25 Operator should take in the event of an incident. In this case, it relates to what Mr. Perra ought to have done when he was instructed to attend and repair Gate 2B. The written instructions are set out as follows:

4 INCIDENT MANAGEMENT STRATEGY

4.1 OVERALL STRATEGY

.1 The overall strategy for responding to an incident remains the same regardless of the specific circumstances of particular incident. Any incident will involve a detection and verification phase, a response phase and requirements for communicating information. Figure 10 indicates the overall strategy for management of any incident at the George Massey Tunnel Lane Control System.

.2 When responding to an incident, the following principles should be adhered to whenever possible:

- Reduce the duration of an incident by all means possible.
- If possible, move vehicles and people involved in the incident off the traveled roadway. If possible move to a location out of sight of passing motorists.
- During rush hour, perform only the clearance and repair tasks necessary to restore safe traffic flow.
- Keep all vehicles, equipment and personnel not immediately required for response operations at an alternate location.
- Set up parking areas for emergency response personnel to minimize the number of traffic lanes blocked by emergency response equipment.

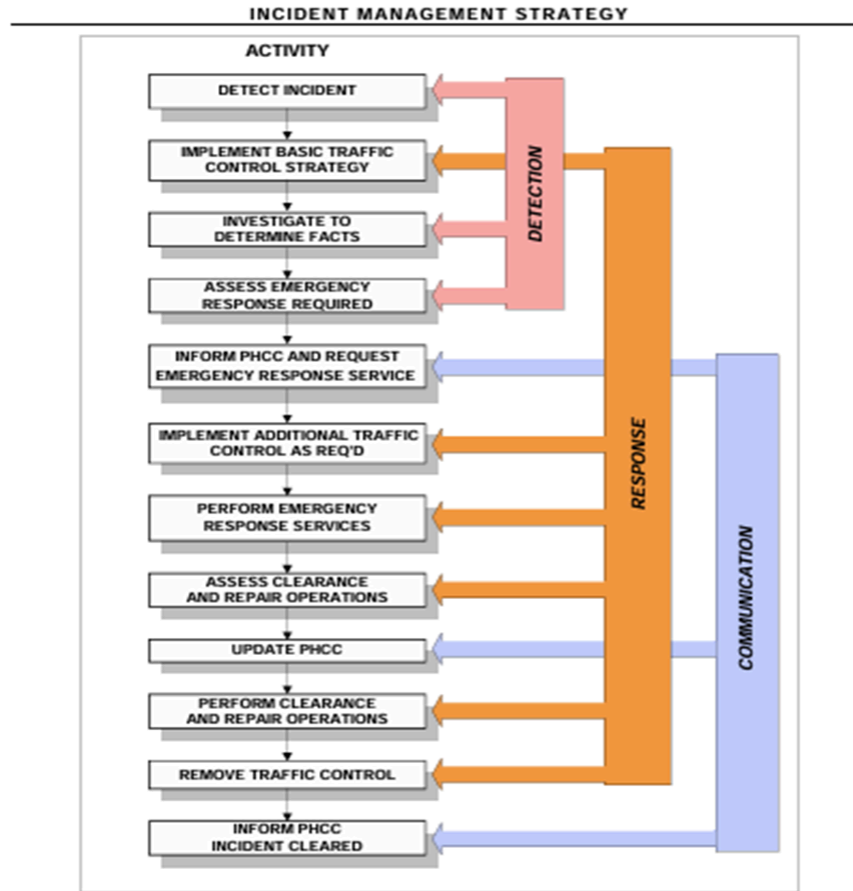


Figure 10 - Overall Strategy for Incident Management

[63] The written procedures for the Massey 25 Operators at an incident are set out as follows:

5.2 WRECKER OPERATOR

.1 The wrecker operator shall:

- .1 Respond to an incident as directed by the LCSO.
- .2 Upon arriving at the incident site, perform an assessment of:
 - .1 Additional traffic control measures required to protect the public and emergency responders and minimize disruption to traffic.
 - .2 Additional emergency response agencies or resources required to protect public safety.
- .3 Take command of the site if appointed the Incident Commander by the LCSO.
- .4 Pass the role of Incident Commander to an emergency responder if they are more qualified to fulfil the role .

- .5 Liaise with and assist emergency responders at the site .
- .6 Manage MOT personnel or contractors working at the incident site.
- .7 Assist in the preparation and Implementation of plans for response, clearance, clean up and repair operations.

[64] I now turn to the question of liability.

Liability

Tort of Negligence

[65] The common law test of negligence is well established. In the leading case, *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at para. 3, the Court succinctly outlines the requirements for a plaintiff, on a balance of probabilities, to establish a claim in negligence:

- a) the defendant owed a duty of care to the plaintiff;
- b) the defendant's behaviour breached the standard of care;
- c) the plaintiff sustained damage; and
- d) the damage was caused, in fact and in law, by the defendant's breach.

[66] In negligence matters involving road maintenance, the duty of care owed by BC to road users is constrained by policy decisions, as highlighted in *Anderson v. British Columbia*, 2008 BCSC 41:

[43] It is well established that the duty of the Province, in general, is to ensure that a highway is reasonably safe for those who travel upon it using ordinary care. It is also settled that a public authority has no duty of care in decisions which are driven by financial, economic, social, or political considerations. Perforce, the allocation of resources arising from budgetary considerations and constraints cannot be made the subject of a duty of care. Liability does not extend to government policy decisions; rather, it applies only to operational decisions relating to the execution of the policy.

[67] As for Mainroad, their duty of care as owed to road users is based on its maintenance contract with BC: *Nason v. Nunes et al.*, 2007 BCSC 266 at para. 31, citing *Just v. British Columbia*, 1989 CanLII 16 (S.C.C.), [1989] 2 S.C.R. 1228; *Brown v. British Columbia (Minister of Transportation and Highways)*, 1994 CanLII

121 (S.C.C.), [1994] 1 S.C.R. 420; and *Lewis (Guardian ad litem of) v. British Columbia*, 1997 CanLII 304 (S.C.C.), [1997] 3 S.C.R. 1145.

[68] Only Mainroad was pursued at trial. The allegations of negligence against the Province and Mainroad Transtronic are not in issue. Mainroad acknowledges it owed Mr. Gordica a duty of care by virtue of their maintenance contract with BC, so the first step of the negligence test is fulfilled.

[69] In this case, it is the standard of care that is the focus, and determinative analysis, of this case.

[70] Both parties cited *Stevens v. Sleeman*, 2023 BCSC 719, aff'd *Emil Anderson Maintenance Co. Ltd. v. Taylor*, 2024 BCCA 156, as reflecting the standard of care for road maintenance contractors:

[101] The standard of care of a road maintenance contractor is reasonableness. A road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety. What is a reasonable state of repair is a question of fact, depending upon all of the surrounding circumstances:

Benoit v. Farrell Estate, 2004 BCCA 348 at para. 39.

[102] In *Harrington v. Sangha*, 2011 BCSC 1035, Justice Willcock, as he then was, discussed the manner in which the terms of a road maintenance contract informs the standard of care:

[142] While the contract may inform the standard of care, it is not determinative. Breach of the contract is not, in itself, proof of negligence because the Crown may require a contractor to perform services to a higher standard than the Crown would itself be obliged to discharge. The law does not impose a higher standard of care upon contractors than the courts would impose upon the Crown, simply because of the provisions of the contract.

...

[71] This passage confirms the standard of care is informed by the terms of the contract, but these terms may require a higher standard than what the Crown itself would be obliged to discharge. As stated in *Harrington v. Sangha*, 2011 BCSC 1035, “[t]he law does not impose a higher standard of care upon contractors than the courts would impose upon the Crown, simply because of the provisions of the contract”: para. 142. In other words, the contract’s terms are informative but not determinative of the standard of care.

[72] The standard of care analysis in negligence law more broadly provides some factors to consider when determining a reasonable standard of care. For instance, in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, the Supreme Court states:

[28] Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

[73] See also, *Gelowitz v. Revelstoke (City)*, 2022 BCSC 46, aff'd 2023 BCCA 139, where the court listed the following as principles for the standard of care assessment: whether the risk of injury was reasonably foreseeable, the likelihood of damage, and the availability and cost of preventative measures: para. 135, quoting *Nelson (City) v. Marchi*, 2021 SCC 41 at para. 91.

Parties' Positions

[74] The plaintiff's theory regarding the standard of care is that on the night in question, wind was the most likely explanation for why Gates 2B and 2C ended up in the southbound fast lane at the GMT. Therefore, because of the windy conditions, Mr. Perra ought to have known when he attended to repair Gate 2B that Gate 2C would be at risk of entering the fast lane as well, and should have secured Gate 2C back with a bungee cord, thereby preventing the Accident.

[75] The plaintiff argues this is buttressed by the failure of the defence to lead contrary evidence regarding the cause of the gate failures – in circumstances where the power to do so was uniquely its own. I will address this aspect of the argument later below.

[76] The bases for the plaintiff's position are as follows:

- a) It was a windy night.
- b) The Massey 25 operator on shift knew gates commonly broke in the wind.

- c) Aside from wind, there was no other likely explanation for the gate being in the lane. More specifically, wind was clearly one of the most likely explanations for the gate being in the lane.
- d) Gate 2C was more vulnerable to wind than Gate 2B.
- e) Any gate being in an open highway fast lane is a serious public safety hazard but Gate 2C being in the lane was an even bigger public safety hazard than Gate 2B because it would extend further into the lane.
- f) The southbound fast lane was closed from 8:21 p.m. until 8:31 p.m. so that Massey 25 could attend the 2-series gates. Gate 2B had broken and was in the lane. It would have cost nothing and taken almost no time to also secure Gate 2C with a bungee cord. Even if the risk of Gate 2C also breaking was small, there was no downside to doing so until the wind had passed. Had Mainroad done so, Mr. Gordica's injury would not have happened.

[77] The plaintiff also states that if wind were to be entirely removed from the equation, with the Massey 25 Operator on scene that night and Gate 2B having entered the lane with no explanation, there would still be good reason to secure Gate 2C back with a bungee cord. If, on the other hand, it was known that Gate 2B broke because of an independent cause, this would be a good reason to address only Gate 2B, as there would be no reason to foresee that other gates could also be at risk. But failing that, in the absence of an explanation to indicate that this was a "one-off", as the defendant referred to it, there was no reason not to take the steps necessary to eliminate the risk if doing so "presented no difficulty, involved no disadvantage, and required no expense."

[78] The plaintiff argues that in these circumstances, the only reasonable course of action was to secure Gate 2C after securing Gate 2B and before re-opening the southbound fast lane.

[79] Mainroad, meanwhile, submits that on the night of the Accident, the GMT was properly monitored and maintained in compliance with the applicable contractual provisions and specifications. They reject the plaintiff's assertion that wind caused Gates 2B and 2C to fail. Mainroad argues that not only does the

evidence suggest the improbability of the scenario posited by the plaintiff, but there is also insufficient evidence to support such a theory.

[80] In addition to various evidentiary issues that Mainroad raises, they also say the plaintiff has failed to identify any relevant provisions in the Maintenance Agreement, Schedule 1 specifications, Local Area Specifications, or the GMT operations manuals by which were not followed. They note that the plaintiff did not tender any expert evidence on the standard of care regarding the monitoring and maintenance of infrastructure like the GMT, including the traffic gate system. Additionally, they note that no expert evidence regarding wind conditions at the GMT and their effect on the gates was tendered.

[81] Mainroad also points to evidence that, over the 30-year history of the GMT's traffic gate system, there have been no incidents where control arms caused personal injury.

[82] Given all this, Mainroad submits that Mr. Gordica's claim ought to be dismissed.

Application

[83] The central question is whether Mr. Perra's conduct met the standard of care. In this case, it is not what Mr. Perra did, but what he did not do. The plaintiff did not challenge the appropriateness of the management, monitoring and repair and maintenance systems in place; the design, installation or use of the gate control system (including the gates or gate arms); or the operation of the gates.

[84] I find several difficulties with the plaintiff's position. As will be canvassed below, my primary difficulty with this theory is that I am unable to make critical findings of fact required for the plaintiff's position to be tenable.

Relevant Findings of Fact

[85] The evidence regarding wind at the GMT on the evening in question was very limited. Neither Mr. Gordica nor Mr. Perra said much regarding wind conditions. It was not a significant feature of their evidence. Mr. Gordica mentioned wind but described that while standing in the rain waiting for a tow truck, he held a "flimsy" umbrella and indicated he was able to hold it and did not mention difficulty in doing so. I note he waited in an open grassy area by the

highway in the rain for about one hour. I reject the plaintiff's submission that on the evidence he found some shelter from the wind.

[86] Mr. Perra testified about wind causing gates to break but did not speak to conditions on the evening in question. His recall of the evening was limited. Further details regarding Mr. Perra's comment on wind affecting gates, including the strength and nature of the wind and specific gates affected (as mentioned there are 30 gates at the GMT of differing lengths) were not solicited by plaintiff's counsel. He did not mention whether such gates affected by wind were struck by cars. He was not asked about what he thought he should have done in the circumstances where he faced windy conditions. I also note that Mr. Perra testified that he was safety conscious for the public and was on the watch of gates being out of place during the many cycles he patrolled the GMT infrastructure that shift. Mr. Perra was a cooperative witness in the plaintiff's case.

[87] The limited extent of Mr. Perra's evidence regarding his actions or lack of action at the time he attended Gate 2B becomes significant considering the testimony of the other witnesses in the defence case who were examined at some depth on the topic. Several had considerable experience in working at the GMT. Their evidence leads me to reduce the reliance that can be placed on Mr. Perra's testimony to support the theory that gates being broken loose by wind was a common event, let alone gates breaking loose at the same time.

[88] Mr. Smith testified there was no systemic problem with wind blowing gates across lanes. He testified that given the high usage of the infrastructure, had there been such a problem, the Ministry would have received considerable feedback from the public and other agencies. As an example, he mentioned the recent problems on the Port Mann Bridge and ice falling from the bridge cables onto vehicles which received significant public attention and response from the Ministry. He testified that since 2016 when he took on responsibilities for the Ministry in relation to the GMT infrastructure, problems with the gates had not been brought to his attention.

[89] Mr. Hayward testified he had never encountered a gate being in a lane due to wind. He also testified that winds at the Tsawwassen Ferry Terminal were different and not the same as at the GMT. He said this in the context that the patrol

of Massey 25 Operators of Highway 99 extends close to the Tsawwassen Ferry Terminal.

[90] Mr. Senft testified that he had observed only on a few occasions of a gate being blown across a lane and that this was when there were “really strong winds”. The gates affected were only the larger gates: 8D, 2F, 4C, and 6C.

[91] Ms. Nelson testified that she had never heard of, or seen, Gate 2B or 2C being blown out of position.

[92] Mr. Ell testified that historically wind had not blown a gate out and that if it did, it would be rare. He also testified that multiple gates failing at the same time had never in his experience happened.

[93] Mr. Roberts testified that when he attended to repair Gates 2B and 2C on the night in question he did not observe strong winds. He testified in the past strong winds would “slap” shut the rear doors of his repair van. This was not the case that night. He was able to keep the rear doors open. He produced photos he had taken of the night in question to support this. While he attended about an hour after the Accident, his comment on wind is another indicator that wind conditions were not remarkable at the GMT that night.

[94] There were no expert metrological or climatological reports tendered regarding wind speed and direction at the GMT or more specifically at the location of the subject gates leading up to the Accident. There was no expert evidence regarding the effect of wind load on the two gates in question. As pointed out by the defence, the plaintiff’s pleadings, trial brief, “will say” for Mr. Perra, and plaintiff’s opening did not identify wind as a feature of their case. The plaintiff’s focus on wind arose only during the defence case. The defendant pointed out that the plaintiff appears to have formulated their theory – that the gate failures were caused by winds breaking the shear pin – during the defence case. I share in that observation. This, the defence explains, is why Mr. Perra’s testimony was not challenged in greater detail. The plaintiff did not contest this defence submission.

[95] The plaintiff tendered Environment Canada weather data including wind speeds from various locations through the cross-examination of defence witnesses. None of this information was put before the plaintiff’s witnesses. In reply submissions, the plaintiff explained the tendering of the wind data was “to

show that on that night, that after one gate had ended up in the lane, another gate ending up in the lane was a reasonably foreseeable risk.”

[96] The weather data was from Environment Canada at Vancouver International Airport, Sea Island and the Tsawwassen Ferry Terminal. They included average hourly temperatures, wind speed, and direction. The plaintiff submits that, based on the weather data from Vancouver International Airport, the hour the Accident occurred happened to be “the same hour with the highest easterly wind in the two months” preceding the accident. Additionally, the plaintiff submits that this same hour “also happened to correspond with the 4th highest winds of the year” as demonstrated by weather data from the Tsawwassen Ferry Terminal.

[97] I do not find the data provides much assistance to the plaintiff’s theory, given the absence of evidence correlating the data to conditions at the location of the subject gates and tolerance of the subject gates to wind conditions. Mr. Hayward’s evidence was that wind conditions at the GMT are not the same as that at the Tsawwassen Ferry Terminal. There was no contrary evidence. I note also from this data, that wind direction can change frequently at the data collection points. This brings further question to the theory of the plaintiff’s case.

[98] Even over the course of 24 hours, the direction varies and can frequently change from hour to hour. The following are a few examples of this inconsistency in wind direction even over the course of a few hours. For instance, and without holding that this location is an appropriate proxy for wind conditions at the subject gates, on January 5, 2019, from noon to 6:00 p.m., the wind direction at the Tsawwassen Ferry Terminal was as follows:

Time	Wind Direction (10s Degrees)
12:00pm	6
1:00pm	31
2:00pm	32
3:00pm	4
4:00pm	6
5:00pm	11
6:00pm	12

[99] On April 14, 2019, the wind direction from noon to 6:00 p.m. was:

Time	Wind Direction (10s Degrees)
12:00pm	22
1:00pm	21
2:00pm	30
3:00pm	35
4:00pm	19
5:00pm	17
6:00pm	23

[100] Also, on August 30, 2019, the wind direction from 5:00 p.m. to 11:00 p.m. was:

Time	Wind Direction (10s Degrees)
5:00pm	28
6:00pm	<i>No data</i>
7:00pm	7
8:00pm	20
9:00pm	14
10:00pm	13
11:00pm	3

[101] Another example is November 25, 2019, from 5:00 p.m. to 11:00 p.m.:

Time	Wind Direction (10s Degrees)
5:00pm	1
6:00pm	35
7:00pm	16
8:00pm	12
9:00pm	16
10:00pm	31
11:00pm	2

[102] While this was certainly not the case for every day of the year, and indeed many days were consistent when it came to wind direction, this evidence does not offer any direct evidence of wind direction at the GMT or wind conditions there the night of the Accident. It would be speculative to consider that the conditions at the Tsawwassen Ferry Terminal were similar to that at the GMT.

[103] In response to the Environment Canada wind data, the defence points to the Beaufort Wind Scale Table which was tendered after the plaintiff's cross examination. This table is how Canadian meteorologists measure wind speed, and list what observable effects different strengths of wind may cause in layman's

terms. According to the table, winds of approximately 39 to 49 km/hr (a “Strong Breeze”) would make it difficult to use an umbrella.

[104] Given the testimony of Mr. Gordica regarding his use of an umbrella, the defence argues that holding a flimsy umbrella without difficulty places the wind at or below 38 km/hr, and in the Fresh or Moderate Breeze category. At speeds of 20 km/hr (as recorded as the closest weather station of Sea Island), the observed land effects for a “Moderate Breeze” would be “raises dust and loose paper.” The defence submits that common sense dictates that if one could hold a flimsy umbrella without difficulty on the side of the road, that Mr. Gordica was not dealing with a very strong wind.

[105] Based on the evidence, my finding is that Mr. Gordica did not have difficulty in holding his umbrella on the evening of the Accident.

[106] My finding based on the evidence of those who were at the scene on the evening of the Accident is that wind conditions were unremarkable, not very strong, and insufficient to cause an average adult difficulty in holding an umbrella. The available evidence is insufficient to support the plaintiff’s theory that the gates were at risk because of wind conditions.

[107] As a result, I do not accept the plaintiff’s theory that both Gate 2B and Gate 2C were at risk due to wind conditions. There is also nothing else in the evidence to suggest the two gate failures were connected and therefore, that Gate 2B’s failure portended Gate 2C’s failure.

Standard of Care Analysis

[108] Alongside my above factual findings, I wish to comment on the specific standard of care argued by the plaintiff: that Mr. Perra should have tied back Gate 2C following Gate 2B’s failure.

[109] As mentioned, the standard of care of a road maintenance worker is one of reasonableness: “[a] road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety”: *Stevens* at para. 101. A reasonable state of repair is a question of fact, depending on the entirety of the circumstances: *Stevens* at para. 101.

[110] Since I have been unable to accept the plaintiff's theory that wind broke Gate 2B and Gate 2C, or even that wind or other circumstances of risk was a factor the night of December 18, 2019, it would be unreasonable to insist that a reasonable state of repair requires acknowledging, and responding to, a risk factor not present at the time of the Accident.

[111] In other words, there was no likelihood of a known or foreseeable harm that would occur, and therefore an onus on Mainroad, through Mr. Perra, to tie back Gate 2C with a bungee cord to avert this alleged harm.

[112] The further problems that I have with the position of the plaintiff regarding the standard of care are:

- a) The absence in the written standards that require gates to be secured in "windy conditions" (which condition the plaintiff does not define).
- b) The absence of evidence that the standards are deficient in not specifying the securing of gates when windy.
- c) The absence of evidence that indicates when and at what level of wind will cause the shear pins to break on a particular gate, recognizing there are different sizes of gates which would likely mean different wind loads. Plaintiff's counsel's response when asked why investigation of the gates was not conducted was that they did not have access to the gates and that they would not know what investigation would be required. I found this response curious and unpersuasive.
- d) The evidence that it was rare for gates to extend into lanes with wind and on such occasions, it was in relation to the larger gates.
- e) The lack of evidence regarding Mr. Perra's perception or experience of the weather conditions at the time he attended at Gate 2B, and why he did not go to Gate 2C or would not have gone to secure it, despite being a cooperative witness in the plaintiff's case.
- f) Mainroad and the Ministry's evidence that they were not aware of personal injury from gates being struck by vehicles and the absence of

evidence that such injuries had ever occurred, except for the present case.

- g) The evidence of Mr. Roberts, that while at the gate locations on the evening in question, he did not note significant wind and supported this with the photos he took on site showing his van doors were open; instead, he testified that with strong winds, his van doors would be forced shut by the winds.
- h) The evidence that there was not a systemic problem over 30 years with gates being affected by wind, and I do not think it is a stretch to assume that it would not be uncommon for conditions to get “windy” around the GMT.
- i) The evidence that gate failures have been singular events and that sequential or coincidental gate failures had not been experienced.
- j) The design of the gate arms contemplates them being struck by vehicles and the evidence that this is not uncommon. I take it that this design was for safety reasons.

[113] In the contracts and manuals for Mainroad’s operations, the Incident Management specifications required Mainroad to detect and verify an incident (i.e., use the camera system to confirm gate 2B was down and then to dispatch Massey 25), respond to the incident (i.e., close the lane, secure the gate into safe position and the reopen the lane and get traffic flowing) and report (i.e., advise AccuSource the situation is all clear). Notably, there is no requirement in the manual to conduct a cause and origin investigation.

[114] On the night of the Accident, these specifications were achieved through Ms. Nelson receiving notice regarding Gate 2B being down and Mr. Perra in response to her direction attending at the downed gate, finding it broken, determining it was unable to be repaired through Mr. Perra’s scope of expertise, and accordingly securing the gate safely away from traffic, with Ms. Nelson then dispatching Mr. Roberts thereafter to carry out further repairs.

[115] Significantly, the plaintiff never questioned Mr. Perra on the steps he took or would have taken to “investigate” the Gate 2B failure as per the *Operations*

Manual Vol 4 – Incident Management, which sets out his obligations.

[116] The plaintiff merely asserts that an investigation by Mr. Perra never took place because there is no record of his analysis in this regard. Again, the plaintiff did not ask this witness, whom they called to testify, what he would have been thinking in the circumstances or on the actual day in question. Instead, the plaintiff put many different hypotheticals to the defendant's witnesses as to what Mr. Perra ought to have been thinking or doing.

[117] Nowhere in the manuals is there a requirement on Massey 25 Operators to conduct a cause and origin investigation. Nor do I take the "Investigate to Determine Facts", as shown in the schematic diagram in the strategy section, required the Massey 25 Operator to consider the nature of wind and its impact on other gates. I agree with the defence argument that Massey 25 Operators are not qualified to conduct such an investigation: their only technical qualification is to hold a Class 5 driving certificate.

[118] There is also an absence of evidence indicating that Massey 25 Operators should have done more than what occurred the night of the Accident. To reiterate, the evidence shows there is an ongoing visual inspection of the gates by operators, as well as by Lane Control Operators by camera, and quick repairs happened upon notice of a problem or upon being dispatched. In my view and considering that this system was not challenged by the plaintiff, this is a reasonable state of repair.

[119] Turning to the plaintiff's proposition that in circumstances where the cause for Gate 2B to break is unknown, that Mr. Perra should have secured Gate 2C, is even more difficult. This is because the plaintiff suggests that only the next gate, Gate 2C, needed to be secured, thus making the exercise a simple step without cost. However, I do not see how the action suggested could be confined to just Gate 2C. In circumstances when the cause is unknown, the natural extension of the plaintiff's argument would necessitate all gates being tied back pending some investigation of the source for the gate failure; or even perhaps all gates having to be tested and found not to be at risk to breaking before being put back into operation. The result was not considered by the plaintiff. My sense is that the cost and potential disruption to the operation of the GMT (including the suspension of

the counterflow system) would be far more than the simple proposition of the plaintiff. I do not accept the plaintiff's view regarding costs being insignificant.

Conclusion on Liability

[120] Given all of the foregoing, I am unable to find that the plaintiff's wind theory or any other foreseeable risk has been established. I am not able to find that Mr. Perra failed to maintain the roads at the GMT to the standard of a reasonable state of repair. While Mr. Gordica played no role in causing the Accident and what he experienced is most unfortunate, I am unable to find liability against Mainroad.

[121] Though I have found that the plaintiff has not established liability against Mainroad, I will address questions related to damages.

Damages

[122] The plaintiff submits that the injuries he suffered as a result of the Accident are concussion, soft tissue injuries to his neck, shoulders, and back which have resulted in chronic pain. It is submitted that the plaintiff now suffers from a constellation of symptoms, variously described as neurocognitive symptoms or "postconcussion symptoms." These include "headaches, sleep disturbance, fatigue, and problems with concentration, attention, and impairment of short-term memory." These are multifactorial in nature and are being contributed to by his pain, lack of sleep, fatigue, and mental health. Regardless of the exact etiology, the plaintiff argues that they are a result of the injuries Mr. Gordica suffered in the Accident.

[123] The defence argues that the key injuries suffered by Mr. Gordica which led to his being unable to return to his international tax advisory practice were not the result of the Accident. The defence submits that the evidence tendered by the plaintiff falls short of establishing causation and that the plaintiff's difficulties are likely due to his pre-existing health conditions which have been well documented.

[124] The analysis here first involves a determination of whether the Accident caused or contributed to his condition. In *Hansen v. Sulyma*, 2013 BCCA 349, the Court of Appeal describes "caused or contributed" in negligence as the following:

[24] The courts traditionally expressed this test in terms of 'caused or contributed to.' In *Bonnington Castings, Ltd. v. Wardlaw* [1956] 1 All E.R.

615 (H.L.), one of the early pneumoconiosis cases, for example, Lord Reid stated:

It would seem obvious in principle that a pursuer or plaintiff must prove not only negligence or breach of duty but also that such fault caused, or materially contributed to, his injury, and there is ample authority for that proposition both in Scotland and England. I can find neither reason nor authority for the rule being different where there is breach of a statutory duty. The fact that Parliament imposes a duty for the protection of employees has been held to entitle an employee to sue if he is injured as a result of a breach of that duty, but it would be going a great deal further to hold that it can be inferred from the enactment of a duty that Parliament intended that any employee suffering injury can sue his employer merely because there was a breach of duty and it is shown to be possible that his injury may have been caused by it. In my judgment, the employee must, in all cases, prove his case by the ordinary standard of proof in civil actions; he must make it appear at least that, on a balance of probabilities, the breach of duty caused, or materially contributed to, his injury. [At 618; emphasis added.]

He identified any “material contribution” for these purposes as one that falls outside the de minimis exception. (At 618-19.)

[25] The phrase “contributed to” in this context was (and is) usually employed to describe causation where there was more than one tortfeasor. As Professor Lewis Klar writes in *Tort Law* (2003):

As has been pointed out by others, courts have used the expression “material contribution” as a test of causation in different ways. It can be used simply as a way of illustrating the “but for” test where there is more than one cause for an injury. It is recognized that in all cases the defendant’s misconduct was only one of several necessary factors required to produce the plaintiff’s injury, each one of which may not have been sufficient in itself to cause the harm. There was, in other words, not a single necessary and sufficient cause, but numerous factors which together contributed to the result. To satisfy the requirements of causation, the plaintiff is only required to prove that the defendant’s negligence “materially contributed” to the injury. A material contribution is equivalent to a cause for the purposes of applying the but for test. [At 396; emphasis added.]

[125] In sum, “contributed to” is where the defendant’s negligent conduct is one of several necessary factors in producing the plaintiff’s injury. Other factors may include a pre-existing condition, as seen in *Athey v. Leonati*, 1996 CanLII 183 (S.C.C.), [1996] 3 S.C.R. 458, at para. 44.

Medical Evidence

[126] The plaintiff’s case had two medical experts: Dr. Caillier, a physiatrist and Dr. Ganesan, a psychiatrist. The plaintiff’s family physician, Dr. Ryan, was also

called.

[127] Dr. Caillier diagnosed Mr. Gordica with the following injuries from the Accident: soft tissue injury involving the neck, upper back and shoulder girdle regions resulting in chronic soft tissue pain, left greater than right; indirectly related soft tissue lower back pain; altered sleep secondary to pain and discomfort with reduced restorative sleep; emotional and psychological symptoms; and probable mild traumatic brain injury (“MTBI”). Her first report states that the symptoms associated with probable MTBI, headaches and fatigue, had resolved.

[128] She states in the first report that Mr. Gordica’s stated cognitive difficulties worsening are not in keeping with a mild traumatic brain injury but is likely in keeping with sleep difficulties, pain, fatigue and mental health. She opines that the plaintiff’s cognitive symptoms are likely multi-factorial and secondary to his sleep difficulties, pain and mental health as well his ongoing fatigue. She also opined that the plaintiff had chronic soft tissue pain in the neck, back and shoulder, left greater than right.

[129] Dr. Caillier opines that the likelihood of Mr. Gordica becoming symptom free is poor.

[130] She opines that Mr. Gordica was likely capable of working as a tax accountant full time, but if at all possible it was recommended that he try to work a maximum of 40 hours per week as this will allow him to better manage his physical symptoms, engage in activities outside of work, as well to have a positive impact upon his mental health.

[131] Contrary to her first report, Dr. Caillier opines in her second report that it is unlikely that Mr. Gordica will return to his pre-incident level of functioning whether at home, work or recreationally. Further, she states that the likelihood of returning to work is poor and he is not competitively employable. He is unlikely to return to work as a tax accountant or within any capacity secondary to the constellation of his physical, emotional and psychological as well as cognitive symptoms.

[132] Dr. Ganesan diagnosed Mr. Gordica with a somatic pain disorder, major depressive disorder, adjustment disorder with symptoms of anxiety and fear of driving, cognitive difficulties, specifically memory issues, and inability to focus for prolonged periods. He opined that the plaintiff’s prognosis was poor. He opined

that it was unlikely that the plaintiff would be able to return to his former work, nor proceed with his previous plan of working after retirement.

[133] Dr. Ryan, the plaintiff's diligent and attentive family physician testified as to his care and treatment of the plaintiff from 2002, which was when he first took on the plaintiff as a patient. In 2010, Dr. Ryan diagnosed Mr. Gordica with adult ADHD based on reports of difficulties with focus, attention and anxiety. He testified it was his belief that he had suffered from ADHD from childhood. He referred the plaintiff to Dr. Amin who had expertise in the treatment of ADHD and to whom he had referred his other patients to as well. Dr. Amin after testing also diagnosed the plaintiff with adult ADHD and prescribed medication for that condition and which Mr. Gordica took until shortly before the Accident. Dr. Amin also found that Mr. Gordica had a generalized anxiety disorder.

[134] Dr. Ryan recorded the plaintiff's complaints of poor sleep and diagnosed mild sleep apnea prior to the Accident and prescribed sleep medication as well as a referral to a sleep clinic.

[135] In June 2019, the plaintiff had hip replacement surgery that was successful. It alleviated pain he had suffered for some time. The plaintiff took about six weeks off from work.

[136] On July 8, 2019, Dr. Ryan's impression was that Mr. Gordica was stressed and overworking. He was sufficiently concerned that he requested that Mrs. Gordica attend the next appointment for Mr. Gordica. On July 22, 2019, Dr. Ryan, in the presence of Mrs. Gordica, advised Mr. Gordica strongly that it he needed a change in his life by reducing his work load to 40 hours per week, and advised him to see a psychologist to help him in making the change. This advice was, in Dr. Ryan's view, very important to Mr. Gordica's well-being. He confirmed the manner in which he wrote his notes at that time were emphatic to reflect the importance of his advice. Mrs. Gordica shared the same concern and supported this advice. Mr. Gordica did not follow this advice to find balance in lifestyle, but he did consult a psychologist for career counselling.

[137] Following the Accident, on July 7, 2020, Dr. Ryan noted that Mr. Gordica reported his thinking speed was close to normal and his efficiency was pretty good. On July 10, 2020, it was noted that Mr. Gordica had not experienced

headaches (which were reported as severe in February 2020) or fatigue for about two months; and his neck, upper back, and shoulder problems had improved.

[138] The plaintiff has had the benefit of an executive medical health plan that included biennial full medical examinations to age 50, and then annual thereafter. The reports from those examinations were tendered at trial.

[139] The defence called three medical witnesses: Dr. Teal, a neurologist; Dr. Bentley, a physiatrist; and Dr. Latimer, a psychiatrist.

[140] Dr. Teal diagnosed Mr. Gordica with:

- a) Possible/Suspected MTBI. In the event an MTBI occurred, it was on the mildest end of the spectrum for qualifying injuries (see discussion).

Dr. Teal describes “suspected” this way:

The term “suspected” MTBI is used when there has been an injury mechanism but where the criteria outlined above are insufficient for the diagnosis of traumatic brain injury, however, when there is the presence of two or more acute symptoms or two or more clinical or laboratory findings. The diagnosis of a suspected MTBI for Mr. Gordica rests on a possible injury mechanism, his report of possibly being dazed or confused for a few seconds, and subsequently developing nonspecific symptoms of headaches and dizziness.

[141] Dr. Teal states that “[it] is very unusual to sustain a concussion simply from rapid braking. Mr. Gordica states he did not strike his head in the Accident. Direct blows to the head are the most significant cause of deceleration impact injuries. It is my experience that it is very uncommon to sustain a clinically significant MTBI simply from rapid braking unless it is due to a high-speed impact such as a head-on collision or an impact with an unmovable object.”

[142] With respect to post concussion syndrome, Dr. Teal states that:

Postconcussion syndrome is not currently a recognized diagnosis in the Diagnostic and Statistical Manual (DSM-5) or in the International Classifications of Diseases 11th edition (ICD-11) due to the wide overlap between symptoms associated with concussion and the signs and symptoms of Whiplash-Associated Disorder and other conditions. Similar symptoms can occur after a vestibular injury or in individuals experiencing chronic pain, depression, or psychological stress. Research has demonstrated that a significant percentage of individuals who have not sustained a brain injury report symptoms consistent with a “postconcussion syndrome,” and therefore these symptoms are not specific to brain injury. The diagnosis of postconcussion syndrome remains controversial, particularly in its protracted form.

[143] Dr. Teal's diagnoses were as follows:

- a) Posttraumatic headaches, mixed pattern;
- b) Grade II Whiplash-Associated Disorder without neurological sequelae;
- c) Multiple nonspecific post-Accident symptoms labelled by various caregivers as "postconcussion symptoms," resolved within four-to-six months; and
- d) Other soft tissue/myofascial injuries without neurological sequelae.

[144] In terms of prognosis, Dr. Teal opined the following:

- a) that the suspected MTBI sustained in the Accident would likely not be associated with any significant long-term neurocognitive sequelae;
- b) that the plaintiff has an excellent prognosis with regards to the Grade II cervical strain and that he is unlikely to develop progressive degenerative disease of the cervical spine;
- c) that it is unlikely he will require surgery in the future for soft tissue neck injuries sustained as a result of the Accident;
- d) that Mr. Gordica would have been partially disabled for no more than three months following the Accident to deal with the symptoms of a possible very mild MTBI, posttraumatic headaches, and soft tissue injuries; and
- e) that Mr. Gordica does not have any permanent neurological disability arising from injuries from the Accident.

[145] Dr. Teal further opined that headaches occurring months or years after the Accident and following the resolution of initial post-traumatic headaches are not causally related to injuries sustained in the Accident. Dr. Teal states that Mr. Gordica's posttraumatic headaches seem to have resolved within four-to-six months. He subsequently began to experience recurrent headaches that became progressive in 2022 and 2023. It is unlikely that the more recent pattern of headaches is causally related to injuries sustained in the Accident.

[146] Mr. Gordica's prognosis for return to work likely hinges on the resolution of mood disturbance, sleep disturbance and management of psychological factors.

[147] From a neurological perspective, he opines that the plaintiff is completely capable of performing domestic and recreational activities.

[148] Dr. Latimer diagnosed Mr. Gordica with Insomnia Disorder, Generalized Anxiety Disorder, and Probable Attention Deficit and Hyperactivity Disorder; and that Mr. Gordica did not suffer any psychiatric injuries as a result of the Accident. Dr. Latimer opined that Mr. Gordica had pre-existing conditions including ADHD, Generalized Anxiety Disorder and Insomnia Disorder.

[149] Dr. Latimer was also of the view that Mr. Gordica does not suffer from psychiatric injuries that would disable him from working.

[150] Dr. Bentley diagnosed the plaintiff with:

- a) Whiplash Associated Disorder Type II with cervicogenic headache – impairment in cervical spine range of movement; no suggestion of intrinsic shoulder pathology; bilateral C6/7 spondylitic referral; normal myotomal and reflex examination; subjective hypoesthesia left C5/6 dermatomes of unclear etiology and temporal onset with no expressed radicular symptoms.
- b) Thoracic sprain/strain – no impairment in range of movement.
- c) Expressed lumbar symptoms with no impairment in range of movement; negative neural tension; normal myotomal and reflex examination; and subjective hypoesthesia left L4-S1 dermatomes; opined not to be in temporal association with the subject date of loss.

[151] In terms of prognosis, Dr. Bentley opined from a physical rehabilitation perspective that complete symptom resolution is guarded given the persisting pain and reported disability at greater than four-and-a-half years post-date of loss, anticipated degenerative changes in the cervical spine, and suspected contribution from a concurrent psychological comorbidity on his somatic presentation. On the latter he deferred to an appropriate assessor. As it related to functional prognosis, Dr. Bentley opined that Mr. Gordica has a favourable prognosis, given there would not be any absolute contraindications to activity as a result of his accident-related conditions, and that he was able to meet and exceed the strength demands of his pre-accident employment. He further opined that it is probable, i.e., more likely than not, that the subject date of loss rendered the cervical and thoracic spine

conditions. However, Dr. Bentley opined the plaintiff's expressed neurocognitive symptoms are not secondary to a traumatic brain injury and are consistent with his extensively documented pre-accident conditions. The expressed lower back complaints are opined to not be temporally associated with the subject accident.

Vocational Review

[152] In her limited scope review report, Ms. Bracken states that in terms of return to work at Deloitte, she would defer to the plaintiff's treating therapist but noted that his occupational therapy program has not yet been able to progress past work simulation into a formal return to work attempt. In order to return to work, Mr. Gordica would need to demonstrate considerable improvement in the domains of headache and pain management, endurance for cognitively-demanding tasks, mood, and fatigue. She stated that it "seems unlikely at this point, although it will ultimately be determined in the occupational therapy program in which he is currently engaged." I will note that Ms. Bracken was requested to conduct only a records review and interview, which was done remotely. She was not asked to conduct any independent objective testing or to conduct a functional or vocational capacity assessment.

Causation

[153] Cases such as the present are challenging given the type of symptoms in issue. The analysis is not a contest of choosing between the case of the plaintiff and the defence. The burden of proof is upon the plaintiff. It is not for the defence to prove its case. If there is sufficient doubt raised in the evidence that prevents the plaintiff from reaching the required threshold of a balance of possibilities, then the case will not have been proven.

[154] I have taken into consideration the approach stated in *McGlue v. Girvan*, 2024 BCCA 208 to which the defence referred:

[48] The approach taken by the judge, in my view, was appropriate. In *Mariano v. Campbell*, 2010 BCCA 410 at para. 40, Justice Groberman cited *Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131, 1993 CanLII 2465 (B.C.C.A.) for the "correct approach" to cases such as the present:

With respect to the evidence required in order to meet the onus lying on a plaintiff in such cases, Chief Justice McEachern (then sitting as a trial judge) in *Price v. Kostryba* (1982), 1982 CanLII 36 (BC SC), 70 B.C.L.R. 397 (S.C.), repeating his observations in

Butler v. Blaylock, [1981] B.C.J. No. 31 (B.C.S.C.), put it thus [p. 399]:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence – which could be just his own evidence if the surrounding circumstances are consistent – that his complaints of pain are true reflections of a continuing injury.

So there must be evidence of a “convincing” nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the normal recovery period, but the plaintiff’s own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.

[155] The court also noted that “convincing” evidence is not related to a higher standard of proof but to where there is little or no objective evidence of a continuing injury and complaints of pain persist for long periods beyond the normal or usual recovery. In this case, there is also the clear evidence of pre-existing conditions that are reflective of conditions the plaintiff says are a result of the Accident.

[156] In this case, there is a well-documented pre-Accident medical history which include symptoms similar, if not the same, to those that the plaintiff says led him to stop working, namely, focus, concentration and memory. I find significant the plaintiff’s lengthy pre-Accident insomnia; anxiety; history of frontal headaches; poor memory, and ADHD, medication for which the plaintiff had taken regularly (with visits with Dr. Amin) for about nine years but ceased taking shortly before the Accident without consulting or advising his treating physicians. Constant throughout was the demanding and high stress of Mr. Gordica’s work. This led to the intervention by Dr. Ryan concurred in by Mrs. Gordica prior to the Accident on July 8, 2019, advising the plaintiff that he required a change in his life to find balance which included the reduction of hours he spent at work to 40 hours a week.

[157] Based on the evidence, I accept that the plaintiff suffered injuries from the Accident. I find that he suffered a Grade II Whiplash injury. I am not persuaded he

suffered a mild traumatic brain injury. The injuries from the Accident resolved including headaches within the normally expected period, except there is some chronic pain in the plaintiff's neck, shoulder and upper back. I do not find it is of significance. The information as to its effect on the plaintiff was limited. Also, I do not find the lower back pain described arose from the Accident nor the light sensitivity more recently described. However, I find that the plaintiff has not sufficiently established that his current ongoing conditions that led him to withdraw from working were caused or contributed to by the Accident. The evidence of Mr. Gordica's pre-existing conditions including unresolved sleep issues, ADHD for which he ceased taking medication shortly before the Accident, anxiety and an unsustainable work-life balance, and the evidence that Mr. Gordica was declining as evidenced by the July 2019 "intervention" of Dr. Ryan with the support of Mrs. Gordica, in addition to the medical evidence tendered by the defence, serve to militate against and raise doubt in the evidence relied upon by the plaintiff to establish that the injuries from the Accident are what led him to discontinue work. The conditions identified are complex and the plaintiff has not sufficiently overcome the challenge of establishing causation.

[158] Key features that have led me to this determination are:

- a) As an international tax accountant and Team Leader of the practice at Deloitte, the plaintiff was engaged in one of the most stressful, demanding areas of practice at Deloitte.
- b) The plaintiff had symptoms of poor memory, concentration, attention, anxiety, chronic insomnia, headaches, and fatigue for many years pre-Accident. Several of these led to the diagnosis of ADHD and General Anxiety Disorder in 2010. The symptoms recorded by Dr. Amin and the self report of his symptoms by the plaintiff confirm the presence of significant symptoms. The plaintiff was able to continue productively with the medication prescribed, and he acknowledged noticing improvement from the medication.
- c) Mr. Gordica discontinued taking his ADHD medications a short time before the Accident, around the time he had hip surgery in 2019.

- d) In July 2019, Mr. Gordica's condition was such that Dr. Ryan arranged for a meeting which included Mrs. Gordica to advise Mr. Gordica that he needed change in his life for more balance. The focus for Mr. Gordica was to reduce his time at work to 40 hours a week. This was a unique and significant step for Dr. Ryan as he had not taken such action in the past with Mr. Gordica. It is notable that Mrs. Gordica supported this recommendation for balance in her husband's life. In cross examination, she acknowledged the plaintiff's memory and sleep issues existed for years prior to the Accident. She had suggested to her husband that he should consult Dr. Ryan.
- e) Mr. Gordica did not accept the recommendation to reduce his workload and continued with his high stress work. He did, however, attend some appointments with a psychologist for career counselling.
- f) That the plaintiff testified that the key reasons for why he stopped working were due to headaches, fatigue, and concentration difficulties.
- g) The plaintiff's resistance or non-acceptance with his diagnosis of ADHD, in my view, diminishes his narrative downplaying his pre-Accident symptoms and skewing them towards the Accident. I note that Mr. Gordica indicated to Dr. Latimer that he had not been given any specific tests or assessment measures related to his 2010 ADHD diagnosis. Mr. Gordica's medical records indicate the contrary. He recognized at least one set of responses and agreed that he rated his sleep as being 4 on a scale of 10, where 10 was the best sleep and 1 was the worse sleep. It is notable that Mr. Gordica, despite distancing himself from the ADHD diagnosis, commenced taking medication for this condition because of the diagnosis and did so regularly for the next nine years. This was medication he acknowledged improved his symptoms. I also note Dr. Caillier's testimony that over time people on medication for a condition tend to forget what their symptoms were like prior to taking the medication for those symptoms. Based on the record of symptoms of the plaintiff when diagnosed with ADHD in 2010, the same can be said here.

- h) In addition to the ADHD diagnoses by Drs. Ryan and Amin, most of the expert medical witnesses in both the plaintiff's and defence case found evidence of ADHD. It is notable that Dr. Ganesan did not administer a test for ADHD.
- i) I also note that Mr. Gordica testified that he was not as forthcoming in sharing information with his executive health physician Dr. Mazarella, as he had his own family physician, Dr. Ryan.
- j) While the plaintiff pointed to pain from his hip condition as a contributor to his sleep issues, his evidence also points to job stress as a contributor. My view is that the plaintiff had sleep issues before his hip pain was a contributor to the issues he had with pain, issues which continued past his hip replacement.
- k) In terms of an MTBI (which includes concussion), there is an absence of direct evidence of the plaintiff striking his head in the Accident or having lost consciousness. He did not suffer memory loss. He reported to Dr. Caillier that he had not lost consciousness. Though not determinative that he was not concussed, the circumstances inform the mildness of the trauma. He was able to bring his car to a controlled stop and not strike any object. He then did a body scan for any injury. Not finding any, he drove his vehicle to a location out of the line of traffic, contacted his wife, called for tow truck service, exited his car to a safe place, reported his accident to the police, retrieved his laptop from his car, took photos of the interior and exterior of his car, and then spoke with the police, while waiting for a tow truck. These steps indicate a clear headed and logical person and reduce the likelihood of MTBI.
- l) The neurological evidence did not identify a cognitive decline. The plaintiff's family physician recommended that the plaintiff see a neurologist or psychoneurologist for a cognitive assessment; however, the plaintiff did not follow up with this. The plaintiff's Montreal Cognitive Assessment tests applied by Dr. Caillier in 2022 and 2024 showed a perfect score. The score from the same test applied by Dr. Ganesan was in the normal range. Scores from Dr. Teal's neurocognitive testing were well within normal limits. Dr. Bentley's cognitive testing showed

“blazing fast” processing and executive functioning, in the 95th percentile.

- m) Given the evidence, my view is that it is more likely that he suffered a Grade II Whiplash but not an MTBI.
- n) In terms of resolution of symptoms from the Accident, I accept the evidence that the symptoms of headache and fatigue dissipated over the course of five- and one-half months which is within the typical period for a whiplash injury to resolve. I accept Dr. Teal’s opinion the Mr. Gordica should not have suffered and likely has not suffered significant persistent neurocognitive sequelae attributable to a traumatic brain injury as a result of the Accident.
- o) The headaches that he complains of at present started about a year and a half after the Accident. These headaches were not cervicogenic, i.e., would not be related to a whiplash type injury. Dr. Teal noted that the plaintiff described episodic headaches that were frontal in nature and triggered by stress and social interactions, not cervicogenic. I accept Dr. Teal’s evidence that the headaches are unrelated to the Accident. I also accept Dr. Teal’s opinion that the suspected MTBI would not be associated with any significant long-term neurocognitive sequelae.
- p) Dr. Bentley opined that the plaintiff’s neurocognitive symptoms were not secondary to a traumatic brain injury and are consistent with his extensively documented pre-accident conditions.
- q) Mr. Gordica did not dispute the clinical entries made by Dr. Ryan that in November 2017 he reported to Dr. Ryan of having had reduced memory and had memory problems for about 10 years. Mrs. Gordica expressed that she also had concerns regarding her husband’s memory and suggested he speak with Dr. Ryan.
- r) The plaintiff had ceased, without consultation or notice to his treating physicians, his ADHD medications which he had been taking for nine years, shortly before his hip replacement surgery.

- s) The plaintiff returned to work shortly after the Accident and continued for about three years.
- t) Dr. Caillier originally opined in 2022 that the plaintiff's symptoms with probable MTBI had resolved and could engage in full time work as a tax accountant, but with a recommendation that he try to work a maximum of 40 hours per week. However, in her October 2024 report she revised her opinion to the plaintiff being unlikely to return to his pre-incident level of functioning and that his return to work was poor and he was not competitively employable. This change was prompted by Dr. Caillier receiving further comments from the plaintiff that he had new information regarding what he experienced after the Accident. That information was based upon insight Mr. Gordica obtained in discussions from the occupational therapist he was seeing. This new information and the manner in how this new insight was obtained by Mr. Gordica was not explored and I have doubts as to how reliable this information is given that it comes some five years after the Accident. I attribute little weight to this revised opinion. I accept Dr. Caillier's first opinion that Mr. Gordica in 2022 was capable of having full time capacity to work as a tax accountant, and that fatigue and headache from the suspected MTBI had resolved.
- u) The plaintiff has had significant sleep issues well before the Accident and that such problems continued post-Accident. He was reported by Dr. Mazarella, the plaintiff's executive health plan doctor, in 2015 to have had insomnia since 2013. At the time, it was noted as Mr. Gordica's biggest health issue. Mrs. Gordica acknowledged her husband's sleep problems. He has only more recently taken medication for this condition but only intermittently. He stated that he will go weeks without taking the medication. I note Dr. Latimer's recommendation for Mr. Gordica to undergo a detailed assessment of his sleep disorder.
- v) Complaints of light sensitivity taken by Dr. Caillier did not arise until well after the Accident.
- w) In terms of activities, the evidence indicates that his chronic pain condition does not limit his physical activities. In terms of non-work-

related activities he has been able to participate in activities with his family. The evidence shows that he has taken his children boating and tubing. This type of activity no doubt would involve a fair amount of noise and activity. He has purchased a condo in Cabo San Lucas to spend time with the family. I note that the sunlight there is quite pronounced. He has travelled with the family to Hawaii. He undertook a major change in residence by moving from Langley to Mill Bay. Mr. Gordica's daughter stated that her parents are travelling more now than in the past. I do not find his chronic pain limits much of his activities.

- x) That there are frequently co-morbidities between ADHD and anxiety and depression. Mr. Gordica on testing was found to have anxiety in 2010.
- y) In terms of observations of work limitations of the plaintiff by colleagues, they had limited physical interactions with Mr. Gordica. Mr. Gordica worked remotely from home throughout the COVID pandemic. Ms. Fikart had worked with Mr. Gordica but their interactions were over the phone. The changes noticed were subtle. There were no issues raised regarding Mr. Gordica's work product. Mr. Gordica remains highly respected by his colleagues. None of his colleagues were aware of the plaintiff's pre-Accident conditions such as ADHD and that he had discontinued his ADHD medication. This is understandable as it would not have been expected that the plaintiff would have told them of this. Witnesses also described Mr. Gordica as a private person.
- z) Ms. Bracken did not observe the plaintiff displaying difficulties in responding to complex questions; nor did she observe any outward signs of distress, discomfort, or confusion during the three-and-a-half hour remote video interview.
- aa) His insomnia pre- and post- Accident are significant. There is evidence that from 2013 to 2018 he plaintiff was frequently waking up each night from 2:00 to 4:00 a.m., with difficulties returning to sleep. In 2019, Dr. Ryan diagnosed sleep apnea. Plaintiff did not tell Dr. Ryan how poor his sleep was post-Accident. I note Dr. Latimer's observation that the PHQ-9 test by Dr. Ganesan had six out of 11 points that related to

trouble falling asleep and feeling tired or having little energy, which supported Dr. Latimer's opinion that the plaintiff had chronic insomnia. My view is that the plaintiff's sleep issues are key to his current condition.

bb) His appearance in court did not reveal difficulties in his ability to engage and respond to questions regarding his health condition and the complex nature of his work and other details.

cc) I attribute little weight to Dr. Ganesan's opinion. There were several aspects that have led me to this. As pointed out by the defence, Dr. Ganesan:

- i. Overlooked and then ignored the plaintiff's long-standing insomnia, despite being provided with the relevant records and observing fatigue during his examination of the plaintiff.
- ii. Recognized that long term insomnia was crucial for evaluating the plaintiff's cognitive complains.
- iii. Overlooked that the plaintiff had been on continuous ADHD medication from 2010 to the summer of 2019. However, he agreed that people with ADHD often have symptoms of anxiety and depression. Nor did he test for ADHD.
- iv. Conducted testing of the plaintiff when he was visibly tired, as per his observation described in his report and his interview notes; yet, strangely testified that he had no evidence that the plaintiff was not fully alert or not fully oriented.

[159] I was also struck by Dr. Ganesan's questioning of the credentials of Dr. Amin and Dr. Ryan in their diagnoses of ADHD in Mr. Gordica. His criticism that the diagnosis of Dr. Amin was simply an exercise of form filling was curious. He did not know Dr. Amin, nor did he make additional inquiries into what Dr. Amin had done. He agreed that the tests administered were the relevant tests at the time. In my view he had little foundation for his criticisms. My sense was that this was a way to deflect attention from the weaknesses in his own reports.

[160] Dr. Ganesan's view of Mr. Gordica's cognitive difficulties is premised on the presence of concussion. I have made my finding that the plaintiff did not suffer

such an injury. I prefer the opinions of the other experts' evidence that neurocognitive issues, are not related to the Accident.

[161] Having discounted the opinions of Dr. Ganesan and the revised opinion of Dr. Caillier, the support for the plaintiff's position is considerably weakened.

[162] The conditions that the plaintiff complains of are multi-factorial, including factors such as insomnia, headaches, stress and ADHD. I find as argued by the defence that the weight of the evidence regarding Mr. Gordica's pre-existing ADHD for which the plaintiff is no longer taking his medications, unresolved chronic insomnia, general anxiety and considerable job stress are greater an explanation as to the cause of the plaintiff discontinuing to work than the theory of the plaintiff.

[163] All the foregoing raises sufficient doubt to conclude that the plaintiff's condition that caused him to cease working was caused or contributed to by the Accident. In other words, the plaintiff has not satisfied me on the evidence that he has discharged his burden of proof.

Assessment of Damages

[164] Despite my above findings, I will address damages. Below are my findings on the various requested categories of damages.

[165] Regarding injuries arising from the Accident, my finding is that the plaintiff suffered a whiplash type injury resulting in headache, and pain in the neck, shoulder and upper back. These symptoms, in my view, largely resolved within five to six months. The chronicity of the pain that remains is limited or minor based on the evidence and is not sufficient to interfere with much of the plaintiff's activities recreationally, socially, or his work. With this in mind, I turn to the various heads of compensation sought.

General – Non-Pecuniary

[166] A non-exhaustive set of considerations for the assessment of damages under this head is set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46: 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.

[167] Under this head the plaintiff seeks \$275,000. This is based upon chronic pain in his neck, shoulder and upper back with significantly worsened sleep; stress; anxiety; depression; frustration and anger; and an inability to focus or concentrate for more than 30 minutes without experiencing debilitating headaches. All which have negatively impacted his ability to participate in activities with his family in the way that he did before. As a result, he and his wife had to move into a smaller home in a quieter community. Additionally, he is no longer able to work in the job and career that was an important part of his personal being. His life is much more limited and defined by his treatments for his injuries. Recovery to what he was pre-accident is unlikely. All of which justifies the amount sought.

[168] The comparable cases put forth are: *Wallman v. John Doe*, 2014 BCSC 79; *Timms v. Lucaben*, 2023 BCSC 1119; *Burr v. Sharma*, 2023 BCSC 1559; *Lines v. Gordon*, 2006 BCSC 1929; and *Young v. Anderson*, 2008 BCSC 1306.

[169] I have found the plaintiff's conditions that led him to discontinue working were due more likely to his pre-existing conditions. As a result, the impacts on much of his claim in relation to the factors above, such as the impact on his mental abilities, loss of lifestyle and emotional suffering are not related to the injuries from the Accident. As for headaches from the Accident, this condition resolved within the usually expected period, as did most of his other complaints. While I accept that there is some ongoing pain, it is minor. As pointed out by the defence, the plaintiff provided few details regarding the quality, intensity, duration, frequency, radiation, or pattern of the pain experienced from his cervical strain, just that he experienced pain in his neck, back and shoulder regions.

[170] Moreover, my observations of the plaintiff over the course of his testimony was of an individual who had a professional and pleasant demeanor and had little difficulty over that time with responding to questions posed. There was a consistency in his appearance and manner. He did not appear to flag during his appearance. There are also aspects of his activities that suggest the impacts of the pain from his Accident are not as serious as attested, such as his travelling to Hawaii and Mexico. Indeed, there is the plaintiff's purchase of a property in Cabo San Lucas to spend more time there. He has engaged in outdoor activities with his children. He was able to move his home from Langley to Mill Bay without comment of difficulties in attending to the move. Dr. Bentley opined that the plaintiff was physically not prevented from doing activities.

[171] In light of this, the cases relied upon by the plaintiff are not comparable to the present case.

[172] The defence argues that the damages under this head, if entitlement was established, should be in the range of \$80,000 to \$95,000. The cases offered up by the defence are more in line with the circumstances of this case: *Malakoe v. Harris*, 2024 BCSC 1178; *Murray v. Doe*, 2023 BCSC 918; and *Barta v. DaSilva*, 2014 BCSC 2113, aff'd 2018 BCCA 68.

[173] In my view, considering the injuries sustained from the Accident that I have found, the damages under this head would be \$95,000.

Special Damages

[174] The parties have agreed that the amount under this head would be \$8,000.

Cost of Future Care

[175] The plaintiff seeks \$32,000 under this head. The manner in which this amount is arrived at is stated in the plaintiff's closing submissions this way:

Drs. Caillier and Ganesan have both made recommendations for treatment and medication which Mr. Gordica has implemented through Dr. Ryan. The treatment helps alleviate symptoms, albeit temporarily. The medication is helpful. His recovery has plateaued and he will require both indefinitely.

In the absence of actuarial evidence on this issue, Mr. Gordica is 58, he can expect to require treatment for an additional 20 years to age 78, using the special damages as a mathematical anchor, \$8,000 over the past 5 years), this works out to an additional \$32,000 for future care.

[176] The plaintiff has not provided what items comprise the \$8,000 for special damages. I was not provided information on the items for future care or the duration such items would be reasonably required. As the defence submits, the approach taken by the plaintiff does not indicate whether some or all of the expenses could be covered through the provincial health services plan.

[177] For an award under this head, evidence of the individual items being sought, the period such item will be reasonably needed, and their cost is required. Where such item is reasonable and medically justified the item and associated cost will be awarded. This is an inquiry into the individual items of care for the

plaintiff. A global claim without underlying detail is not an appropriate approach to damages under this head. Unfortunately, the plaintiff has done that.

[178] As a result, an award under this head has not been justified.

Income Loss and Earning Capacity

[179] Damages sought under this head include both past loss and future loss.

[180] Compensation for past loss of earning capacity is to be based on what the plaintiff would have earned but for the injury suffered. Burden of proof of actual past events is a balance of probabilities.

[181] In regard to compensation for future loss, the approach is a comparison of the plaintiff's likely future earnings without injury to their likely future earning with the injury.

[182] For both past and future loss assessments, consideration of hypothetical events is required. Positive and negative contingencies are to be reflected. Such events do not require proof on a balance of probabilities; rather, it is whether on the evidence there is a real and substantial possibility. It is not an event that is just a possibility and speculative.

[183] The measure of damages is an assessment (as opposed to a mathematical exercise) of the likelihood of an event — the weighing of possibilities and probabilities of the hypotheticals.

[184] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47, Justice Grauer described the approach as a three-step inquiry:

1. Whether the evidence discloses a potential future event that could lead to a loss of capacity;
2. Whether on the evidence there is a real and substantial possibility that the future event in question will cause a pecuniary loss; and
3. If so, assess the value of that possible future loss which includes determining the relative likelihood of the possibly occurring.

[185] A loss may be quantified either on an earnings approach or on a capital asset approach. In this case, the former would be applicable.

[186] Mr. Gordica's income is substantial. From his partnership he earned the following:

- a) income from the partnership operations;
- b) income from a partnership trust arising from an administrative services business unit;
- c) a small irregular income; and
- d) a pension that he is eligible to start receiving at age 58, at a discount of 6% per year, and he is entitled to a full pension under the Deloitte mandatory retirement age of 62 years without discount in May 2029.

[187] The period of past loss is from 2020 to January 2025.

[188] The actual earnings (less a capital gain in 2021) from 2013 is set out below:

Year	Actual Earnings	Actual Annual Increase (%)	Actual Annual Earnings Growth
2013	\$578,076		
2014	\$599,343	+3.68%	\$21,267
2015	\$605,020	+0.95%	\$5,677
2016	\$617,610	+ 2.08%	\$12,590
2017	\$611,820	-0.94%	-\$5,790
2018	\$613,889	+0.34%	\$2,069
2019	\$633,317	+ 3.16%	\$19,428
2020	\$818,673	+29.27%	\$185,356
2021	\$915,006	+11.76%	\$96,333

2022	\$835,255	-8.72%	-\$79,751
2023	\$527,690	36.8%	-\$307,565

[189] Using the earnings approach, the plaintiff submits the net loss with LTD benefits added in (which are not taxable) is \$1,025,549; or \$664,234 net of LTD benefits. The earnings for the period were increased using 11.98%. This annualized increase was derived by taking Mr. Gordica's increase for the years 2016 to 2021.

[190] The defence argues that the increase used by the plaintiff is not reflective of the plaintiff's earning's history and is not reflective of the plaintiff's anticipated annual growth when adjustment for the COVID years are made. The defence observes that since 2013, the plaintiff's income has for many of those years been stagnant. Over the seven years leading up to the year of the Accident, the plaintiff's income grew in total by only 9.5% or on average 1.3% per annum. In real dollar terms, his income buying power was declining. The plaintiff argues that the income figures from 2020, 2021, and 2022 are anomalous because of the impact of COVID efficiencies to Deloitte and the sale of a business unit in 2021. The defence observes that the plaintiff's use of its annualized increase is artificial and not grounded in the evidence and results in the illogical income amount for 2029 of \$3,096,988.

[191] The defence submits two proposals for assessing past loss: the first by averaging the plaintiff's actual earnings from 2013 to 2019, and the second adjusts those earning for inflation into 2025 dollars.

[192] In my view, there should be recognition of efficiencies captured by Deloitte during the COVID period; some may be permanent and others only temporary. There should also be recognition that more work came in for the plaintiff during this period. Again, some sustaining and other not. I am, however, not persuaded that the 11% annual increase is sustainable or reasonable, given the history back to 2013, which gives a better picture over the long term. I note that the increase in the plaintiff's 2020 income to his income in 2022 is about 2% after normalizing out 2021.

[193] Given the foregoing, the baseline to use for this assessment is \$800,000. This recognizes the increase in work and efficiency gains. I then apply a 3% annual increase. This accords directionally with the testimony of Mr. Labelle regarding growth targets for the organization and is much more in line with the plaintiff's income growth historically. This baseline also recognizes the increase in income from the previous period, which continues into the future.

[194] The difference from the earnings with the annual increases as described and that earned by Mr. Gordica is \$1,336,943. I then discount years 2023 (partial), 2024, and 2025 (to trial) by 40% for the contingency (real and substantial possibility) that Mr. Gordica in any event, would have discontinued working as a result of his pre-existing condition. The result is \$789,939 before tax deduction (marginal tax rate of 53%) and reduction of LTD benefits of \$361,315.

Future Income Loss and Earning Capacity

[195] Taking the baseline income for 2025 of \$927,419 based on 3% growth from 2020 and extending it to May 2029, the value is \$3.8 million.

[196] I agree with the plaintiff that the defence position of adding back some residual income is not warranted given the high threshold that would have to be attained relative to the LTD benefits he receives. I also agree that general labour market adjustments are not applicable.

[197] The next step is to take into consideration the negative and positive contingencies.

[198] The plaintiff argues there are several positive contingencies such as growth in the demand in his area of expertise, growth in the business income for Deloitte, and opportunities beyond retirement for people with skills such as the plaintiff.

[199] The defence submits the following negative contingencies should be incorporated:

- a) The inevitability of the Plaintiff having to reduce his hours and earnings regardless of the accident as per Dr. Ryan's "intervention". Noting the evidence that suggested he could not reduce his hours to 40 hours a

week and continue as an equity partner. According to others, it is just not what equity partners do.

- b) His inability to rectify his sleeping condition.
- c) His untreated ADHD and unwillingness to accept this condition.
- d) His inability to “Change his Life”.

[200] As a result, the defence submits that a 50% reduction is warranted.

[201] On this latter point I agree with the plaintiff. I also have taken into account some growth in income; however, the negative contingencies are deserving of much greater weight as argued by the defence. I find that a reduction of 40% is in order. However, I also add a \$100,000 positive contingency for increased growth.

[202] My assessment of the net future loss is \$2,380,000, taking into consideration labour market risk, before LTD deductions, and taxes.

Loss of Trust Income Benefits

[203] There is trust income which is also sought. This comes from a company that provides administrative services for Deloitte. That income goes into a trust and equity partners draw from that trust. This income used to be allocated to his wife but, after changes to the rules around tax splitting, they began going directly to Mr. Gordica.

[204] These are earnings paid as T3 income – Statement of Trust Income – as reflected in Exhibit 8. These show the amounts paid in each year from 2014 – 2023:

2014	\$57,124
2015	\$58,498
2016	\$58,199
2017	\$56,900
2018	\$63,986

2019	\$64,097
2020	\$64,620
2021	\$67,607
2022	\$60,974
2023	\$35,097

[205] The 2023 amount was reduced because once on long-term disability, Mr. Gordica was no longer eligible for the payment, such that 2023 reflected a partial year, up to his July 23, 2023, transition to LTD. He was still considered an active partner in the first part of 2023 while on short-term disability and therefore received trust income for that period.

[206] Using \$60,000 per year as Mr. Gordica's DMS Trust Income, he lost \$25,000 in 2023 and \$60,000 in 2024.

[207] The total loss from the DMS Trust as a result of Mr. Gordica's disability is \$85,000 for past income, plus \$248,880 in future loss, for a total of \$333,880.

[208] The defence argues that the plaintiff has not accounted for any deduction in income tax. It is submitted that no evidence was tendered by the plaintiff in this regard but there was evidence that based on changes to the tax code the plaintiff could no longer shelter this income by transferring it to his wife. BC's highest marginal tax rate is 53%, which would result in a net loss of \$39,950.

[209] Thus, the defence argues that the plaintiff's total loss of past and future trust benefits before applying any negative contingency for leaving the workforce early would total \$268,910. If one applies a 50% reduction this equates to a loss of \$134,455.

[210] In my view, the deduction should be 40%. The loss under this head would then be \$161,346.

Loss of Pension Benefits

[211] The plaintiff also claims for pension income loss because he has had to go on LTD and thus is no longer able to accrue pension benefits from July 23, 2023.

[212] Had Mr. Gordica continued to earn the same income as an equity partner to his age 62 retirement, the pension would have paid him \$158,000 per year, such that in retirement, he will lose \$42,000 per year.

[213] Although there is an option to take early retirement pay at age 59, that is subject to a discount of 6% per year, such that there would be a 24% discount if he took it at age 59.

[214] The pension is payable until Mr. Gordica's death and is not transferred to his spouse.

[215] Table 6 of Mr. Pivnenko's report shows that Mr. Gordica has a 50% chance of surviving to age 84. He is currently 58 years old, so that represents a further 26 years. Using the Present Value Table at Appendix E to the Civil Jury Instructions, the present value multiplier for 26 years at a 1.5% discount rate is 21.3986. However, from that we have to account for the first four years to age 62 when he would not be receiving his pension regardless. The multiplier for 4 years is 3.8544. That figure gets deducted from the 26-year multiplier to give us a multiplier of 17.5442, covering the next 26 years, less the first 4 years.

[216] The present value of a \$42,000 per year pension benefit, from age 62 to 84, is \$736,846.40.

[217] The defence corrects the inputs of the plaintiff at 25 years life expectancy. Utilizing the multiplier of 16.8652, the loss in pension is \$708,338. The plaintiff did not contest this in its reply.

[218] I accept the position of the defence. I apply a 40% contingency of the plaintiff stopping work in any event. The result is a loss of \$425,000.

[219] Had liability and causation been established, the damages assessed are as follows:

a) General	\$95,000
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- b) Special \$8,000
- c) Cost of Future Care nil
- d) Past Loss \$789,939 before tax and LTD benefit
- e) Future Loss
 - (i) Income \$2,380,000
 - (ii) Trust \$161,346
 - (iii) Pension Loss \$425,000

Conclusion

[220] The plaintiff has failed to establish that the defendant Mainroad was liable for the Accident. The plaintiff has also failed to establish the Accident caused or contributed to his ability to continue to work.

[221] The action is dismissed.

“Masuhara J.”