IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Somers v. MacLellan*,
2023 BCSC 1449

Date: 20230821
Docket: M196934
Registry: Vancouver

Between:

Cody Eugene Somers

Plaintiff

And

Richard MacLellan and Marilyn MacLellan

Defendants

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

Counsel for the Plaintiff:	R. Parsons E. Sadowski
Counsel for the Defendants:	J.D. McAfee L. von Bloedau
Place and Date of Trial/Hearing:	Vancouver, B.C. October 3-7, 11-14, 17-20 and 24-28, 2022
Place and Date of Judgment:	Vancouver, B.C. August 21, 2023

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I. Introduction

[1] The plaintiff, Cody Somers, and defendant, Richard MacLellan, were in a motor vehicle accident on March 22, 2019 ("Accident"). They were travelling in a Ford F250 crew cab truck ("Ford") owned by the defendant Marilyn MacLellan. Mrs. MacLellan had loaned the Ford to Mr. MacLellan, her son, not long before. No other vehicles were involved and there were no third-party witnesses.

[2] The Accident occurred at or about 11:00 PM on the Old Fort Loop Road ("Road"). Taking the Road, it is about a 15-minute drive from Fort St. John to an area known as Old Fort, which is where they were headed.

[3] The Road is a paved, two-lane road. In general terms, it runs south on leaving Fort St. John and then curves and begins to run east toward Old Fort. The Accident occurred just after the curve and when the Ford began heading east. The Ford crossed the west bound lane, entered a ditch ("Ditch") running parallel to the west-bound lane, rolled at least once and ultimately ended upright inside the Ditch facing west.

[4] When the Ford came to a rest, Mr. Somers was lying in the Ditch in front of the front end of the Ford. When Mr. Somers became conscious, he could not move his legs and began to yell. When Mr. MacLellan became conscious, he was inside the Ford and heard Mr. Somers yelling. He crawled out of the Ford through a window and found Mr. Somers. When a vehicle came down the Road, Mr. MacLellan flagged it over and the driver called 911.

[5] Aside from some bruising and soreness, Mr. MacLellan walked away from the Accident unscathed. Mr. Somers suffered devastating injuries, including a severe spinal cord injury ("SCI") resulting in paraplegia.

[6] Liability is denied. It is not disputed that the driver was negligent, nor that negligence was a cause of the Accident. The complication is that Mr. Somers and Mr. MacLellan each assert that the other was driving.

[7] In order to succeed on his action, Mr. Somers must establish on a balance of probabilities that Mr. MacLellan was driving. If the Court is unable to determine who was driving, Mr. Somers' claim must be dismissed.

[8] Mr. Somers claims for non-pecuniary damages, past and future loss of earning capacity, cost of future care and special damages. He also makes in-trust claims for his mother and brother, and seeks to have the issues of tax gross-up and management fees determined after damages have been quantified.

[9] Mr. Somers advanced a claim for punitive damages based on allegations that Mr. MacLellan had possession of his cell phone immediately following the Accident, but did not call 911 and instead made two calls looking for someone to help him flee the scene of the Accident. The claim for punitive damages was not pursued in closing argument.

II. Liability

A. Non-Contentious Background Facts

[10] Mr. Somers was 29 at the time of the Accident and 31 at the start of the trial. He was raised in Miramichi, New Brunswick. He was encouraged to come out to Fort St. John for work by New Brunswick friends who were already working there. He moved out in 2012, initially residing with his girlfriend and a friend who had moved out with them. Later, when his younger sister, Kayla Somers, and her common-law spouse, Shayne Durelle, moved to Fort St. John, Mr. Somers began living with them. About three months before the Accident, he had moved to a large, riverfront house in Old Fort ("House"), renting it along with his friend Kyle Mitchell.

[11] Initially, the plaintiff worked in Fort St. John as a labourer. When the company he was first at completed its service contract, one of the plaintiff's Miramichi friends, Martin Comeau, helped get him a labourer position where he worked, Daski Contracting ("Daski"). Daski performs water management for fracking operations.

[12] Mr. Somers met Mr. MacLellan when they were both working for Daski in 2013. For a time, they shared a room in a Daski employee building. They bonded

over a common interest in dirt bikes and all-terrain vehicles (ATVs). Mr. Somers and Mr. MacLellan worked together at Daski for about three years, but after that each went on to a different employer.

[13] Mr. Somers left Daski to take employment with Ditmarsia Holdings ("Ditmarsia"), a trucking business specializing in the transportation of sand and gravel, hazardous waste, and heavy machinery. At Ditmarsia, Mr. Somers took on an apprenticeship and began working towards being certified as a heavy-duty mechanic.

[14] Mr. MacLellan moved on from Daski to Full Bore Contracting ("Full Bore"). Full Bore performs trenchless boring, which is another fracking-related service.

[15] After they ceased to work together, Mr. Somers and Mr. MacLellan remained friends. Although they each had a different core social group, they got together occasionally, often in a way that related to dirt biking.

[16] This brings us to more contentious matters. As a forewarning to the reader, I note that the timing of events on the evening of the Accident are disputed. That dispute is complicated by the fact that their respective phone records show different times for a key telephone call, which is relevant to when Mr. MacLellan arrived at the House and how long they were at the House together before heading out in the Ford.

B. Mr. Somers' Version of the Facts

[17] The day of the Accident was a Friday. Mr. Somers had been working in Ditmarsia's shop that day and left work around 6:00 PM in his personal vehicle, a 2009 Chevy truck (the "Chevy"). Ditmarsia's building is about a 15-minute drive from the House. On his way home, Mr. Somers stopped and bought a six-pack of Palm Bays (a six percent vodka drink sold in cans) and a bottle of Fireball (a cinnamon-flavoured whiskey). He believes he arrived at the House around 6:20 PM.

[18] The House has a heated garage (“Garage”) with two vehicle bays and two vehicle bay doors. The Garage is large with room on the sides to store snowmobiles and dirt bikes and room in the middle to perform work, including mechanical work. Reflecting the nature of the space, the Garage was frequently referred to in evidence as “the shop.”

[19] The side of the Garage containing the entry bay doors is connected to the public road running past the House. The driveway is large enough to accommodate four full-size trucks parked two abreast (i.e., two trucks in front of each bay door). On arrival, Mr. Somers parked the Chevy on the right (as viewed from the public street) side of the driveway and immediately behind a truck Mr. Mitchell was restoring (the “project truck”). The project truck was parked directly in front of the right bay door. Mr. Somers parked on the right side deliberately, as he planned to take out his dirt bike out using the left bay door.

[20] Shortly after getting home, Mr. Somers took his dirt bike out of the Garage and went for a ten-minute or so ride to see how the bike trails in the nearby hills were drying out from the winter. He returned to the Garage at about 6:45 PM and began to tune-up his dirt bike, drinking a Palm Bay and listening to some music while doing so.

[21] Mr. Somers made a few phone calls while his working on his bike. He called Mr. Comeau at 7:04 PM and they spoke briefly.

[22] Mr. Comeau testified and confirmed that they had a conversation and that it took place at that time. He testified that he had confirmed the time of the call by reviewing his own phone records. (Although Mr. Comeau appeared to have brought copies of his phone records into the witness box, neither counsel asked to see them.)

[23] Mr. Somers called Mr. MacLellan twice at 7:18 PM, but Mr. MacLellan did not answer either time. On the second try, Mr. Somers left a voicemail message. He then returned to working on his bike and drinking Palm Bays. At 8:06 PM,

Mr. MacLellan called him back. Mr. Somers gave him a report on the bike trails and invited him to come over and see the new House. Mr. MacLellan agreed, and Mr. Somers continued to drink Palm Bays while he waited for him to arrive.

[24] The plaintiff's reporting on what and how much he drank at the House that evening has evolved over time. He acknowledged those changes He explained in his testimony that after he learned the blood alcohol concentration ("BAC") test results from a sample collected after the Accident, he reasoned that he must have had more to drink than he had thought. Mr. Somers' BAC was approximately 0.16 percent. (For context, the legal limit for criminally impaired driving is 0.08 percent.)

[25] On April 23, 2019, Mr. Somers told Cst. Fraser of the Vancouver Police Department that he had had two or three cans of Palm Bay at the House before the Accident; on April 20, 2022, he told Dr. Kulwant Riar (the defendants' psychiatry expert) that he had four drinks at the House; at trial, he testified that he had six cans of Palm Bay and possibly some of the Fireball while at the House, and that he had all those drinks prior to Mr. MacLellan's arrival, except that he was still drinking the last Palm Bay when Mr. MacLellan arrived.

[26] Mr. Somers' evidence regarding the time of Mr. MacLellan's arrival at the House has also morphed. Mr. Somers testified that he had rethought what "must" have happened after reviewing the disclosed phone records.

[27] At discovery, Mr. Somers testified that Mr. MacLellan arrived between 8:00 and 8:30 PM. At trial, he testified that Mr. MacLellan must have arrived about 9:15 PM. As Mr. Somers interprets them, Mr. MacLellan's phone records show that Mr. MacLellan participated in a six-minute phone call starting at 9:06 PM. Mr. Somers testified that he is certain that Mr. MacLellan did not participate in a six-minute call while he was at the House, and thus must have arrived after the call was concluded.

[28] Mr. Somers says that when he arrived, Mr. MacLellan parked the Ford directly in front of the Garage's left bay door.

[29] Mr. Somers testified that he gave Mr. MacLellan a tour of the House and finished the last Palm Bay during the tour. He said that if there had been any Palm Bays left, he would have offered one to Mr. MacLellan. He testified that during the tour, he and Mr. MacLellan decided they would go get some more alcohol and then come back to the House and drink it.

[30] Mr. Somers testified that after the tour, while he and Mr. MacLellan were hanging out in the Garage, Mr. Mitchell came through and spoke with them briefly. Mr. Mitchell was on his way out to go to his girlfriend's house.

[31] Mr. Mitchell testified. He said that he had arrived at the House at about 9:00 PM. He said the Chevy was parked behind the project truck, so he parked behind the Ford. He then took a shower and changed his clothes to go over to his girlfriend's. He left through the Garage, where he encountered Mr. Somers and Mr. MacLellan, and spoke with them for perhaps five minutes. He said that he did not see them drinking alcohol, but agreed on cross-examination that it was possible that they were and he simply failed to notice.

[32] Mr. Mitchell testified that when he left, he drove to his girlfriend's house, which is about a 15 to 20-minute drive from the House. When he got there, he realized he had forgotten to bring shorts to wear in her hot tub. As there is a Walmart only three or four blocks from his girlfriend's, they drove there and he bought some shorts. He testified that the Walmart closes at 10:00 PM and that he made it there about 10 to 20 minutes before closing.

[33] Mr. Somers testified that after the House tour was concluded, he saw Mr. MacLellan looking at his own phone. Mr. Somers testified that Mr. MacLellan stepped outside of the Garage for ten or 15 minutes, and that when he came back in he said that Emily (his common law spouse, Emily Lays) needed him to pick something up. Very shortly after that, he and Mr. MacLellan left in the Ford.

[34] Mr. Somers testified that Mr. MacLellan had nothing to drink at the House. He said he had no knowledge as to whether Mr. MacLellan had any alcohol before

he came to the House, but described him as appearing “normal” (in the sense of not appearing impaired) when he arrived.

[35] Mr. Somers said that they left in the Ford with Mr. MacLellan at the wheel. Mr. Somers testified that he did not drive that evening because he had been drinking and he does not drink and drive.

[36] He says they went first to an Esso gas station located about eight or nine kilometres down the Road toward town and Mr. MacLellan parked at the side of the Esso building. Mr. Somers stayed in the Ford and Mr. MacLellan walked off toward the building. Mr. Somers says he assumed Mr. MacLellan was going to pick up whatever he was supposed to get for Ms. Lays. He believes Mr. MacLellan had “something” in his hands when he returned to the Ford.

[37] Mr. MacLellan then drove another kilometre or so to the Econo Lodge liquor store (the “Liquor Store”). Mr. Somers testified that Mr. MacLellan’s driving on the way to the Esso and the Liquor Store was fine. They both went inside the Liquor Store. Mr. Somers bought another six-pack of Palm Bays and another bottle of Fireball. Mr. MacLellan bought a bottle of Patron tequila and a six-pack of some sort.

[38] On leaving the Liquor Store, Mr. Somers says he got into the front passenger seat and Mr. MacLellan got into the driver seat. Mr. Somers did not put on his own seatbelt. He cannot recall whether Mr. MacLellan did. They headed back to the House on the Road. Mr. Somers says neither of them drank anything while they were in the Ford.

[39] On the drive back, near the curve in the Road, Mr. Somers teased Mr. MacLellan about having to drive his mother’s car. In response, Mr. MacLellan squatted down in the driver’s seat and pushed the gas pedal to the floor. This caused Mr. Somers’ phone to fall to the floor. As he retrieved it, he saw the speedometer reading was 140 kmph. He asked Mr. MacLellan “is that all it has?”, and Mr. MacLellan replied “yes.” Mr. Somers says that a few kilometres on, Mr. MacLellan let out a “roar” noise as if he was startled and the Ford began to go

out of control and swing around so the passenger side was leading the Ford's way down the Road.

[40] The next thing Mr. Somers recalls is laying in the Ditch. He tried to move in order to get up. When he realized that he could not move his legs, he began yelling for Mr. MacLellan. Eventually, Mr. MacLellan appeared beside him and Mr. Somers told Mr. MacLellan that he was unable to move his legs. Mr. Somers continued to go in and out of consciousness.

[41] A vehicle came by driven by Jonathan Palfy. Mr. MacLellan waved at Mr. Palfy. Mr. Palfy stopped, checked on Mr. Somers, and called 911. Police records show that that call was made at 11:00 PM. Mr. Palfy remained at the scene, encouraging Mr. Somers to maintain consciousness. Paramedics and police arrived and Mr. Somers was taken to Fort St. John Hospital ("FSJH") by ambulance. In the in the early morning on March 23rd, he was air-lifted out to Vancouver General Hospital ("VGH"). (None of the facts in this paragraph are disputed.)

[42] Mr. Somers is only able to recall snippets of his time at the Accident scene, at FSJH and of his initial stay at VGH.

[43] The police did not speak with Mr. Somers at FSJH. His first police statement was a brief unrecorded phone conversation with Cst. Dreyer of the Fort St. John RCMP detachment on April 13, 2019. He made a second statement in-person on April 23, 2019, when interviewed by Cst. Fraser of the Vancouver Police Department at Vancouver's GF Strong Rehabilitation Centre ("GF Strong"). In both statements, Mr. Somers denied being the driver.

[44] In his second statement, Mr. Somers told Cst. Fraser that he sustained injuries, including from glass, on the right side of his body. Mr. Somers also stated that he had been told that glass had been removed from his right ear and the right side of his head in the surgery room. Mr. Somers testified at trial that someone had told him that while he was VGH, but that he had no idea who it had been.

[45] There is nothing in Mr. Somers' medical records about glass needing to be removed or noting the presence of glass on him.

C. Mr. MacLellan's Version of the Facts

[46] Like Mr. Somers, Mr. MacLellan was 31 years old at the time of trial. He remains employed by Full Bore and continues to live with his common law spouse, Ms. Lays, and their children. (Ms. Lays was pregnant with their second child at the time of the Accident.)

[47] On Christmas Eve 2018, Mr. MacLellan was in a single-vehicle accident ("2018 Accident"). His personal vehicle was a loss. He eventually pled guilty to driving without due care in January 2021 in relation to the 2018 Accident. Mr. MacLellan testified that he was unaware of there being any drug or alcohol issues related to the 2018 Accident.

[48] Following the 2018 Accident, Mrs. MacLellan loaned him the Ford. The loan was on the understanding that the Ford would be returned in the near future. Mrs. MacLellan testified and confirmed that Mr. MacLellan had the Ford with her consent at the time of the Accident.

[49] Mr. MacLellan's work requires him to attend out-of-town project sites. On the day of the Accident, he was working at a project site near Mile 120 on the Alaska Highway. He was scheduled to work at a different site the next day (Saturday). He testified that his work hours are generally 7:00 AM to 7:00 PM, but with only the start time being firm and finishing time often being earlier or later than 7:00 PM.

[50] He estimated Mile 120 to be about a 90-minute drive from Fort St. John. He travelled out to Mile 120 that day with a supervisor, "Chad", leaving the Ford at Chad's place in Fort St. John. Mr. MacLellan testified that he was paid for his travel time to and from the Mile 120 project site. He said this was because the distance between Mile 120 and Fort St. John was such that paid travel time and camp fees for its employees to stay on-site were equal expenses from Full Bore's perspective.

[51] At trial, Mr. MacLellan testified that he stopped working at Mile 120 site at about 5:15 PM and then rode back to Chad's place with Chad, where he retrieved the Ford. He testified at trial that as he was leaving Chad's house, he placed a 7:06 PM phone call (as shown on Mr. MacLellan's phone records) to Mr. Somers and during the conversation Mr. Somers invited him to the House. Mr. MacLellan changed direction and drove over to the House instead of continuing home.

[52] Mr. MacLellan was discovered on November 23, 2021 and again on September 16, 2022. At his second discovery, Mr. MacLellan gave evidence that he received a 7:06 PM call from Mr. Somers while he and Chad were driving back to Fort St. John and were in the Charlie Lake area, and that that was when Mr. Somers invited him over to the House.

[53] Mr. MacLellan testified the driveway leading up to the Garage is too narrow for two trucks to park side-by-side and so when he parked the Ford behind the Chevy.

[54] Mr. MacLellan says he helped Mr. Somers carry some things out to the hot tub, and then they sat and drank in the Garage and talked about dirt biking. He said he drank some Fireball and some Cold Shots (a kind of beer), while Mr. Somers drank some Fireball and some Palm Bays. He says that at 8:06 PM he spoke briefly on the phone with Chad to confirm some details about his work location for the next day.

[55] Mr. MacLellan testified that they finished the bottle of Fireball and that at 9:57 PM he telephoned Ms. Lays from the House's kitchen and told her that he and Mr. Somers were drinking and he was going to stay over at the House. He says that call was a speaker phone call at his end and that Mr. Somers was standing near him during the call.

[56] Ms. Lays testified. She was unable to recall who had placed the call, but testified that she spoke with Mr. MacLellan that evening and that the conversation was prior to 10:00 PM. She said that Mr. MacLellan was using his speaker function

and that Mr. Somers was involved in the conversation. Mr. MacLellan told her he was at the House and would stay the night there. She was confident the call was sometime between 8:00 and 10:00 PM, because she had already put their five-year-old (who has a set bedtime of 8:00 PM) to bed, but was not in bed herself. As she had a young child and was five months pregnant, she had an established bedtime herself and would have been asleep at 10:00 PM. She said the call was definitely not at 10:57 PM.

[57] Mr. MacLellan does not recall anyone else being at the House that evening, including Mr. Mitchell.

[58] Mr. MacLellan testified that Mr. Somers was keen on going into town because he wanted to get some cocaine. Mr. MacLellan had a drug problem a few years back. Mr. MacLellan says he placed two calls from his own phone to drug contacts by calling two numbers that were still in his contacts list, but that neither call was answered. He says he made those two calls to help put Mr. Somers in contact with a cocaine dealer. Mr. MacLellan says the calls shown in his phone records as being made at 10:05 and 10:07 PM were those two calls.

[59] Mr. MacLellan testified that Mr. Somers drove because he (Mr. MacLellan) would not drive because he had had too much to drink. He testified that they took the Ford because there were “issues” with the Chevy.

[60] Mr. MacLellan denies having told Mr. Somers that he needed to pick something up for Ms. Lays, and denies that they went to the Esso. He testified that Mr. Somers drove them directly to the Liquor Store. He testified that he bought a bottle of Patron and some Cold Shots at the Liquor Store, but agreed on cross-examination that it was possible that he got a six-pack of Palm Bays rather than Cold Shots. He said Mr. Somers bought a bottle of Fireball and a six-pack of Palm Bays.

[61] Mr. MacLellan says that when they left the Liquor Store, he was in the passenger seat with his seatbelt on and Mr. Somers was driving. He cannot recall

whether Mr. Somers put his seatbelt on. Mr. MacLellan said he had his passenger side window “cracked” open, about six to eight inches, so as to be able to put his hand out the window to throw a cigarette away. He denies that either of them drank anything in the Ford on the way back to the House.

[62] With respect to the Accident, Mr. MacLellan recalls only that the Ford started to go out of control and that there were multiple impacts. When he regained consciousness, he was inside the Ford and could hear Mr. Somers yelling for help from the outside. He tried the door, but was unable to open it because it was “crunched” shut, so he went through a “smashed out” window as the next quickest way out. At his first discovery, he could not recall which window he went through, but at trial said he certain that it was not the rear window.

[63] He located Mr. Somers quickly once he got out. Mr. MacLellan says he then searched for their phones so he could call for help, but could not find either phone, so then he stood in the Road to flag down a car. After a period that Mr. MacLellan described as maybe 30–60 minutes long, a man (Mr. Palfy) pulled over in a truck. Mr. Palfy spoke with Mr. MacLellan, checked on Mr. Somers, and then moved his own truck back up the Road and called 911. Mr. MacLellan testified that he understood that Mr. Palfy moved his truck in order to get cell service to call 911. Mr. Palfy then came back and waited with them.

[64] The paramedics and the police arrived. After Mr. Somers was loaded into the ambulance, Mr. MacLellan rode with Mr. Somers and Cst. Dreyer to FSJH. Mr. MacLellan stayed at the hospital, waiting for an update on Mr. Somers. Mr. MacLellan did not receive any medical treatment at FSJH after the Accident. After a time, FSJH advised him that Mr. Somers was going to be air-lifted to VGH, and then Mr. MacLellan got a ride home from the RCMP.

[65] Mr. MacLellan returned to FSJH at 10:30 AM on March 23, 2019, largely at his mother’s insistence. He reported pain in his neck, abdomen, right shoulder and right ankle. He was examined and scans were done, but no injuries were discerned. Mr. MacLellan testified that he believes the pain he had was from his seatbelt

tightening during the Accident and, with respect to his ankle, from him attempting to brace himself.

[66] At discovery, when asked whether the RCMP had ever returned his and Mr. Somers' phones, Mr. MacLellan said that he got his phone back. At trial, he said that he did not get his phone from the RCMP, but rather received a call saying that he could pick up his phone at the impound lot the Ford was taken to and that he went to the lot to collect it.

D. Mr. Palfy's Evidence

[67] Mr. Palfy testified at trial. He came across the Accident scene while driving to his own home in Old Fort. Mr. Palfy spoke with Mr. MacLellan and then got out and went to check on Mr. Somers himself. After checking on Mr. Somers, he concluded that he should move his own truck back up the Road so his headlights and hazard lights would alert vehicles coming around the curve. He could not recall whether he called 911 before or while moving his truck, but said he called 911 quickly after seeing Mr. Somers. Police records indicate the 911 call was made at or a few minutes before 11:00 PM.

[68] Mr. Palfy said he tried to get Mr. Somers to focus in an effort to keep him conscious. He described Mr. MacLellan as being "pretty frantic" at the Accident scene, and as being coherent but appearing to be in shock. Mr. Palfy said that Mr. MacLellan stayed near him and Mr. Somers while they waited for the ambulance and seemed very concerned about Mr. Somers.

[69] Mr. Palfy testified that he did not find a phone at the Accident scene or turn a phone into the RCMP.

E. RCMP Evidence: Accident Scene & Aftermath

[70] The paramedics got to the Accident scene before the police did. They found Mr. Somers supine in the Ditch, lying about six to eight feet in front of the Ford with his feet closest to the Ford.

[71] Constable Christiaan Dreyer, Cst. Jodi Lewis and Cpl. Greg Jodoin, all members of the RMCP, attended the Accident scene. All three testified.

[72] Constable Dreyer was the first officer on the Accident scene and the lead investigator for the case. Constable Lewis arrived immediately after he did.

[73] When Cst. Dreyer arrived, the paramedics already had Mr. Somers on a stretcher. Constable Dreyer surveyed the scene and observed a number of liquor containers strewn about. When he spoke with Mr. MacLellan, he noted that he had watery eyes and an odor of alcohol. Constable Dreyer rode in the ambulance with Mr. Somers and Mr. MacLellan. At FSJH, he had a sample of Mr. Somers' blood collected for BAC testing.

[74] After Cst. Lewis arrived at the scene, she took a large number of photographs of the Ford and the surrounding area. Two of her photographs, taken at 11:39 and 11:57 PM, show the positions of both front row seatbelts as fully retracted. She observed three cans of Palm Bay inside the Ford cab and found nine more and a bottle of Fireball outside the Ford. No Patron was found, however, Cst. Lewis did not search the Ford, but rather looked through the windows. She found other alcoholic drink containers in the vicinity, including three empty cans of Hey Y'all (an alcoholic iced tea drink).

[75] Her notes include an observation that Mr. MacLellan smelled of alcohol.

[76] At 12:36 AM, Cpl. Jodoin arrived at the Accident scene. Corporal Jodoin is an RCMP accident reconstructionist. He laid out markers and Cst. Lewis helped him take measurements of the Accident scene. Corporal Jodoin was not called as an expert witness, but rather to speak to his personal observations with reference to his notes and photographs.

[77] Once at FSJH, Cst. Dreyer and Mr. MacLellan waited for an update on Mr. Somers. During this time, Cst. Dreyer took a statement from Mr. MacLellan ("MacLellan Statement"). In it, among other things, Mr. MacLellan said he had been in the passenger seat wearing his seatbelt and Mr. Somers had been driving.

[78] Constable Dreyer also took photographs of Mr. MacLellan while they were waiting. The photographs show distinct splotches of mud on the left side of Mr. MacLellan's clothing. Constable Dreyer testified that he asked Mr. MacLellan to lift his sweatshirt so he could look for seatbelt marks. He found and photographed a horizontal abrasion, about five to seven inches long, running across Mr. MacLellan's abdomen (the "Abrasion"). In the photograph, Mr. MacLellan has his sweatshirt pulled up and the waistband of his sweatpants somewhat pulled down. Constable Dreyer testified that if there had been any other marks on Mr. MacLellan or other mud splotches, he would have photographed those as well.

[79] Constable Dreyer testified that the RCMP file did not indicate that any cell phones had been found at the Accident scene, but there was a note logged in stating that Mr. Somers' phone was turned it at the detachment six days after the Accident. The notation reads that the phone was turned in by "the complainant." For purposes of the Accident, Mr. Palfy, as the 911 caller, is the complainant. Constable Dreyer testified that it was possible the notation was an error. The plaintiff's sister, Kayla Somers, collected the phone for the plaintiff.

F. Evidence regarding Damage to the Ford

[80] By trial's end, there was no significant dispute about the physical state of the Ford. (The dispute is centred on what the damage tells us about dynamic forces and occupant kinematics during the Accident.) Based on the evidence, the state of the Ford post-Accident was as follows:

a) Both front row seatbelts were in the fully retracted position immediately following the Accident. Neither seatbelt had loading marks.

b) The driver side of the cab was significantly displaced. The front pillar (or A pillar) on the driver side was pushed rearward and the front of the cab was crushed down into the driver compartment. The crushed roof nearly touched the head restraint on the driver seat and protruded even further into the driver compartment in front of the driver seat.

c) Horizontal (or lateral) scuffs ran across the exterior passenger side of the Ford, particularly in the area of the B pillar and on the doors. There was also some front to back scuffing on the exterior roof.

d) There was a rearward deformation on the front bumper, somewhat to the driver side of centre.

e) The rear box was somewhat deformed inward on both sides and the tailgate was hanging.

f) The windshield was detached at the top edge and mostly shattered. The top half was detached from the side edge on the passenger side, but the bottom half on the passenger side was not shattered and remained attached at the side edge. The windshield on the driver side was shattered and largely folded into the driver compartment.

g) The driver seat side window was shattered and completely out. The glass fragments inside the window edging show the window was about four to six inches open (down from the top) when it was shattered.

h) The front passenger side window was fully intact and mostly open, being about four inches up from the bottom.

i) The back row passenger side window was fully up and fully intact.

j) The back row driver side window was shattered and completely out.

k) The rear window was shattered and completely out.

l) The driver side front and back doors were significantly damaged. Both doors were found to be jammed shut on post-Accident examination by Brandon Cathcart (of CEP Forensic).

m) The front passenger side door suffered no significant damage. The exterior mirror was knocked off and the paint was scuffed. On examination, Mr. Cathcart found the door operational.

n) The passenger side rear door suffered some damage. Mr. Cathcart found it incapable of latching.

o) There was significant mud splatter along the exterior of the driver side, including the upper portion of both driver side doors. There was dirt, but not mud splatter, on the passenger side of the Ford.

p) There were some vertical angled scratch marks and abrasions on the upper portion of the driver side interior door panel. The scratches get less deep as they approach to the slot for the window. There are small glass fragments embedded in the interior panel scratches and abrasions.

q) There was a small crack on the top surface of the interior driver side panel (where the panel begins to curve downward). There is also a mark on the interior driver side panel that may be a clothing transfer mark.

r) The steering wheel was displaced downward. The steering wheel was at least further turned, and possibly further displaced, between earlier and later photographs taken of the Ford. The lower right portion of the rim of the steering wheel has marks on it and, in at least some photographs, appears slightly deformed.

s) The driver side grab handle is displaced from when the roof was crushed in and there are some scuff marks near it.

t) There is a smudge marking on the driver side sun visor, the driver side of the overhead console and on the roof liner (i.e., the ceiling) above the driver seat.

u) There is a scratch in the roof liner diagonally from the area above the driver seat to the area over the back passenger side seat.

v) On the right side of the dashboard, a Vans sneaker shoeprint is visible. (It is an agreed fact that both Mr. Somers and Mr. MacLellan were wearing Vans.)

[81] Unfortunately, some disputed facts regarding the damage were only resolved shortly before or during the trial, which has implications for the liability expert reports.

[82] The most significant late-resolved fact relates to the front row seatbelts. Corporal Jodoin's notes and report state that he observed the front passenger side seatbelt to be hanging in an extended position. The metadata confirmed that Cst. Lewis' photographs showing both seatbelts fully retracted were taken before Cpl. Jodoin arrived. It was also conceded during trial that the damage to the grab bar was due to the roof crush and not, as initially asserted by the defendants, due to interaction with an occupant.

G. Assorted Red Herrings in the Evidence

Prior Driving Conduct

[83] Mr. Somers testified that he did not drive on the evening of the Accident because he had consumed too much alcohol and because he does not drink and drive. (Mr. MacLellan subsequently testified to similar effect.)

[84] The defendants sought to put Mr. Somers' driver's extract to him during cross-examination. They argued that Mr. Somers had put his character in issue by his testimony and that were entitled to adduce evidence that Mr. Somers habitually drove impaired. The defendants also placed reliance on *Statton v. Johnson*, 1999 BCCA 170 [*Statton*].

[85] *Statton* involved a single-vehicle accident in which both occupants were ejected. Mr. Statton died in the accident and Mr. Johnson sued. The trial judge held that Mr. Statton had been the driver. That finding was overturned on appeal: see paras. 36-40, 48. At para. 48, the Court of Appeal stated:

> [48] In this case, a combination of speeding infractions admitted by the respondent Johnson in cross-examination at trial coupled with a transcript of his driving record that was filed establish that he had amassed a great number of speeding convictions between 1989 and 1997. As I counted them,

> there are over 25 of these infractions. The great majority of these occurred between 1989 and 1994. A large number of the offences involved highway speeding. As noted by the trial judge, Johnson was under a driving suspension at the time of the accident. This accident occurred as a result of a vehicle being driven at a very excessive rate of speed. The respondent Johnson has a remarkable record for this sort of conduct. I do not overlook the fact that Statton had some speeding convictions as well but his record is of a different order entirely from that of Johnson. It seems to me that it could justly be said that this very substantial history of speeding on the part of Johnson could be found to have probative force and be a highly relevant matter for a trier of fact to assess in deciding the question at issue in this case, namely, who was the driver of the Dodge car at the time of the accident? I find it impossible to say as a matter of logic that this would not be a matter potentially probative on this matter. While the record is one arguably demonstrating "bad conduct" of Johnson as a driver, it also could be reckoned to be highly probative of the fact that he was more probably the driver of the Dodge at the relevant time. I believe that a trial judge could and should undertake a similar act analysis in deciding this case.

[86] I held that defendants' counsel could put Mr. Somers' driving record to him as his testimony had put his driving character in issue in relation to his conduct on the evening in question. I further held that if, at the end of the trial, the defendants' evidence on driving character also provided an evidentiary basis for a similar fact argument regarding driver identity, the argument could be made.

[87] From October 7, 2017, through January 6, 2018, Mr. Somers was subject to a 90-day driving prohibition under s. 215.43 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 (the "Prohibition"). Mr. Somers testified that he had got the Prohibition driving home after a dinner with friends. He said he found getting and serving the Prohibition a deeply humiliating experience.

[88] At trial's end, the Prohibition was the only evidence adduced regarding Mr. Somers' driving character. In closing argument, the defendants argued the Prohibition itself was probative of driver identity. I disagree. The Prohibition does not establish a pattern, let alone a pattern probative of identity on these facts.

[89] The defendants also argued that the Prohibition reflected poorly on Mr. Somers' credibility. I disagree with that as well. As a single incident, the Prohibition does not undermine Mr. Somers' assertion that he was opposed to driving impaired at the time of the Accident. (To the contrary, it could be argued that

it was the reason for his position.) The same would apply to the 2018 Accident and Mr. MacLellan's testimony indicating that he would not drink and drive.

The Reason for the Going into Town

[90] Mr. MacLellan testified that Mr. Somers was keen to go into Fort St. John because he wanted to try to buy some cocaine. Mr. Somers, in turn, testified that Mr. MacLellan told him that he needed to go to pick up something for Ms. Lays.

[91] I find that they made a plan to spend the night drinking at the House. It makes sense that they would have discussed how they would spend the evening shortly after Mr. MacLellan arrived. I accept Mr. Somers' evidence that a plan to hang out at the House and drink was made during or shortly following a viewing of the new House. I also accept that part of that plan involved getting more alcohol. The provisions Mr. Somers picked up on his way home from work were insufficient and already depleted. Thus, agreeing to go get more alcohol would reasonably form a part of the plan from the outset. The existence of such a plan is consistent with the significant volume of alcohol they bought at the Liquor Store and the fact that they were headed back toward the House at the time of Accident.

[92] If one or both of them subsequently decided they wanted to get something additional in town, it was in a context where they were already going there.

[93] Further, there was no suggestion that Mr. MacLellan said Ms. Lays needed something urgently, and the defendants confirmed they were not suggesting Mr. Somers had a cocaine addiction. Thus, neither of the attributed reasons for going into town provide any basis for inferring the other was particularly insistent on going into town and would have been more likely to have agreed to drive as a result. Thus, even if established, the attributed reasons for wanting to go would not be probative evidence of driver identify.

Mr. MacLellan's Past Drug Use

[94] Mr. MacLellan admits to having had a drug problem several years ago. It is part of his evidence regarding the last two calls shown on his phone record.

[95] In argument, the plaintiff speculates that Mr. MacLellan was a drug user at the time of the Accident and that he spent time in the aftermath of the Accident ensuring that no evidence of his possession and/or use of drugs was found when the police attended.

[96] There is no credible evidence that Mr. MacLellan was under the influence of drugs at the time of the Accident. There is no credible evidence that there were any drugs or drug paraphernalia present to be discovered at the Accident scene. These submissions are groundless and ought not to have been advanced.

H. Phone Records

[97] Phone records play a significant role in this dispute. As already noted, the timeline is in dispute and both Mr. Somers and Mr. MacLellan significantly revised their version of the evening after reviewing the phone records disclosed.

[98] The most notable thing about the phone records is that Mr. MacLellan's and Mr. Somers' records show a different time with respect to the call in which they spoke directly with one another and in which Mr. Somers invited Mr. MacLellan to the House (the "Invitation Call").

[99] Mr. Somers' phone records for March 22, 2019, show:

a) a two-minute call to a 778 number (identified as belonging to Mr. Comeau) at 7:04 PM;

b) a one-minute call to Mr. MacLellan's number at 7:18 PM;

c) a second one-minute call to Mr. MacLellan's number at 7:18 PM; and

d) an eight-minute incoming call from Mr. MacLellan's number at **8:06 PM**.

[100] The phone records in evidence do not indicate when Mr. Somers sent or received text messages. None of Mr. Somers' actual text messages are in evidence.

[101] Mr. MacLellan's phone records (which use a 24 hour clock) for March 22–23, 2019, show five outgoing calls:

a) an eight-minute outgoing call to Mr. Somers' number at **19:06 (7:06 PM);**

b) a six-minute call to an Alberta number (identified by Mr. MacLellan as being to Chad's number) at 20:06 (8:06 PM);

c) a two-minute call to a Nova Scotia number (identified by Mr. MacLellan as Ms. Lays' number) at 21:57 (9:57 PM);

d) a one-minute call to a Fort St. John number at 22:05 (10:05 PM); and

e) A one-minute call to a different Fort St. John number at 22:07 (10:07 PM).

[102] Mr. MacLellan's records in evidence do not show incoming phone calls (e.g., the two one-minute calls shown at 7:18 PM on Mr. Somers' records are not shown anywhere).

[103] Mr. MacLellan's records show times for text messages under a list entitled "event details". While some entries in that list are ambiguous ("TXT MSG – Short Code Programs"), there are no entries demonstrating that Mr. MacLellan sent out any text messages in the period following the Accident. None of Mr. MacLellan's actual text messages are in evidence.

I. Credibility and Reliability

[104] The assessment of credibility and reliability is patently central to this case. *Brodie v. Khangura*, 2022 BCSC 1316, provides an overview of the relevant law:

> [88] Reliability and credibility are related but distinct concepts. The distinction between them was considered in *R. v. Morrissey,* [1995] O.J. No. 639, 22 O.R. (3d) 514 (C.A.) at para. 35, cited in *United States v. Bennett*, 2014 BCCA 145 at para. 23:
>
> > Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's

> ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. ...
>
> [89] In considering credibility, the evidence of a witness must be assessed for "its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 at 357 (C.A.).
>
> [90] A frequently cited list of factors in assessing evidence as to both the veracity of a witness and the accuracy of that witness' evidence is found in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296. It includes:
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> a) The ability and opportunity of the witness to observe events;
>
> b) The firmness of their memory;
>
> c) Their ability to resist the influence of interest to modify their recollection;
>
> d) Whether their evidence harmonizes with independent evidence that has been accepted;
>
> e) Whether the witness changes their evidence during cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in their recollection;
>
> f) Whether their evidence seems generally unreasonable, impossible or unlikely;
>
> g) Whether the witness has a motive to lie; and
>
> h) The demeanour of the witness generally.
>
> [91] A trier of fact may accept none, part or all of a witness' evidence and may attach different weight to different parts of a witness' evidence: *Gill Tech Framing Ltd. v. Gill*, 2012 BCSC 1913 at para. 28.

[105] There are stark conflicts here. With respect to driver identity, the testimony is irreconcilable. At least one of the parties is flatly lying. There is conflicting testimony from Mr. Somers and Mr. MacLellan on a vast number of additional points, critical and minor alike (e.g. whether they drank alcohol together at the House, whether Mr. Mitchell came by, and whether they moved things out to the hot tub).

[106] There is no value to be obtained in generating an inventory of conflicts and findings. I readily conclude that neither Mr. Somers nor Mr. MacLellan is generally

worthy of belief. Suffice to say that I am satisfied that both came to court prepared to lie in support of their positions.

[107] Among other things with regard to Mr. Somers, as set out below, I reject his trial testimony about when Mr. MacLellan arrived, about not drinking together at the House, and that he was not present when Mr. MacLellan called Ms. Lays.

[108] Mr. Somers also testified at length in direct to the effect that he only drinks alcohol maybe three times a year and only on the odd occasion when a large group of friends is able to meet up. (The Court was advised this was relevant to the dispute regarding life expectancy.) No attempt at all was made to reconcile this with Mr. Somers' testimony regarding his conduct on March 22, 2019 (or a subsequent July 2019 dinner with Mr. Mitchell, after which he had to attend FSJH emergency and was found to have a higher BAC than he had on the night of the Accident). This is, no doubt, due to that fact that it is irreconcilable. I conclude that Ms. Somers' testimony regarding his drinking behaviour was false and contrived to support his damages claim. This is a telling example as it is, in no part, a reliability issue.

[109] I turn now to examples from Mr. MacLellan's testimony.

[110] Mr. MacLellan testified that he parked the Ford behind the Chevy at the House because the driveway was too narrow for trucks to be parked side by side. The evidence that the Garage has two bays and two side-by-side vehicle entry doors is undisputed. An overhead photograph of the House and property is in evidence. It shows driveway of consistent width running from the side of the Garage with entry doors to the public road in front of the House. Thus, the driveway would be two lanes wide in order to service the two vehicle entry doors. Mr. MacLellan's evidence on the point cannot be accepted.

[111] Mr. MacLellan denied at discovery that he was aware of any drug or alcohol issues in respect of the 2018 Accident. The transcript of his January 25, 2021, guilty plea and sentencing for driving without due care were put to him on cross-examination. It shows Mr. MacLellan personally confirming for the sentencing judge

that the impaired driving count under the indictment did not form part of the plea. Mr. MacLellan then testified that he was not aware of the impaired driving count and that his criminal defence counsel had never told him that count was included in the indictment, which beggars belief.

[112] As a final example, there is the MacLellan Statement. In it, Mr. MacLellan indicates that Mr. Somers (already driving the Ford) picked up Mr. MacLellan after Mr. MacLellan got off work and that Mr. MacLellan was riding with Mr. Somers in service of getting to his own residence. When cross-examined about the many inaccuracies, Mr. MacLellan first attempted to minimize his answers as “drunk talk”, and then offered a series of idiosyncratic interpretations of Cst. Dreyer’s straightforward questions by way of explanation for his answers. I find the MacLellan Statement was designed to give Cst. Dreyer an inaccurate understanding and Mr. MacLellan’s attempted explanations for what he said in the statement unworthy of belief.

[113] Mr. Somers and Mr. MacLellan also both argued that the other had strong motive to falsely deny being the driver. The plaintiff asserts that the impaired driving count in the 2018 Accident indictment had not been settled at that point and Mr. MacLellan would have been worried about the impaired count being pursued to trial. The defendants argue that Mr. Somers’ first statement was not until April 13, 2019.

[114] I agree that it would have been apparent to the plaintiff by April 13, 2019, that there would be adverse consequences for him if had been driving. However, it would equally been apparent to Mr. MacLellan standing at the Accident scene that there would likely be serious repercussions for the driver. His mother’s Ford was wrecked and Mr. Somers was almost certainly very seriously injured. The possibility that it might scuttle a plea deal regarding the 2018 Accident is unlikely to have been foremost in his mind, but there was still abundant reason to be concerned.

[115] In any event, there is nothing to be gained by attempting to determine which of them had greater motivation to lie; they both had more than sufficient.

[116] Reliability issues also abound. Mr. Somers and Mr. MacLellan both substantially changed their versions of events as between police statements, discovery and trial. They also both candidly admitted to having revised their "recollections" by inference after disclosure (i.e., phone records and/or BAC test results).

[117] Further, Mr. MacLellan describes himself as intoxicated at the time of the Accident, while Mr. Somers' BAC is a known fact. They also both lost consciousness in the Accident. While Mr. MacLellan regained his at the scene, Mr. Somers' was more seriously impaired and then medically altered (for pain and surgeries).

[118] Mr. Somers and Mr. MacLellan were the only witnesses to the Accident, and neither of them has presumptive credibility. Their testimony must be carefully scrutinized and contrasted with credible evidence from other sources.

[119] In my view, Mr. Palfy, Mr. Mitchell, Mr. Comeau, Ms. Lays and Mrs. MacLellan were all forthright witnesses. I have concluded that is so notwithstanding that, with the sole exception of Mr. Palfy, they are all closely aligned with either Mr. Somers or Mr. MacLellan. Mr. Mitchell and Mr. Comeau are Mr. Somers' childhood friends. Ms. Lays and Mrs. MacLellan are Mr. MacLellan's immediate family. However, as witnesses, they did not embellish and were prepared to concede limitations on their knowledge. To the extent that these witnesses gave evidence based on their personal knowledge, it was credible and I accept it. (Mrs. MacLellan had relatively little to say that was within her personal knowledge, but that is a reflection on the questions asked, not the answers she gave.)

III. Expert Evidence regarding the Accident

[120] The plaintiff called two expert witnesses on liability: (1) Donald Rempel, a forensic engineer specializing in motor vehicle accident reconstruction; and (2) Darrin Richards, a biomechanical engineer. The defendants called Rebecca Moss, who was qualified both as a biomechanical engineer and a forensic engineer with respect to motor vehicle accident reconstruction. All three provided reports and responding reports were provided by Ms. Moss and Mr. Richards.

[121] There is general agreement about the general path of the Ford. The dispute centres on occupant motion within the cab and opportunities for occupant ejection. There is also a dispute whether the cause of the Abrasion is more likely a seatbelt or due to contact between Mr. MacLellan and an object while passing by one another.

A. Rempel Report dated May 13, 2022

[122] Mr. Rempel examined and photographed the Ford in the impound lot in July 2019. He also visited and examined the Accident location and surrounding area. Mr. Rempel reviewed the RCMP file materials, including the RCMP photographs and scene drawings, and had a 3D scan done of the Accident scene.

[123] A 3D scan is a high-speed method of surveying with lasers that provides extensive and very precise measurements. The measurements can be input into a computer program called PC Crash. PC Crash creates a virtual road surface and employs the laws of physics to create a vehicle animation accounting for conditions and other informational inputs.

[124] Mr. Rempel did his own physics analysis of the vehicle path before creating a PC Crash animation. That is, the animation is not Mr. Rempel's analysis, but rather only a tool for visualizing and assessing his physics analysis. Mr. Rempel testified that the mechanics of the crash shown in the PC animation are consistent with his physics analysis.

[125] Mr. Rempel stressed that PC Crash animations are only approximations and depict the path of the vehicle in general terms. They do not purport to depict precise vehicle-ground interactions.

[126] A number of variations (e.g., different angles) of the PC Crash animation were put into evidence. In the animation, the Accident occurs as follows. At the start, the Ford goes out of control and into a "yaw" (sliding sideways) while rotating counter-clockwise. The front bumper of the Ford impacts the far bank when the vehicle crosses the Ditch. The contact with the far bank of the Ditch marks the end of what Mr. Rempel refers to as the "first impact type interaction."

[127] The second impact type interaction begins immediately after the bank contact. As the front wheels of the vehicle are on gravel, they begin to “furrow” (dig in and displace gravel) as the tires push sidewise against the ground during the yaw movement. The furrowing rapidly decelerates the vehicle, creating high lateral forces, especially on the front passenger side tire. The furrowing (aided by the downhill slope of the Road, the angle of the Ditch and the yawing) ultimately triggers a “trip.” The trip is the instant where the vehicle begins to accelerate into a roll.

[128] At the trip point, the driver side tires start to lift off the ground and the passenger side tires almost cease to have forward movement relative to the ground and are just about to lose contact with the ground. When the passenger side tires lose contact, the driver side tires continue up and the passenger side tires come under the vehicle and then go up into the air, initiating the roll.

[129] Mr. Rempel testified that the lack of damage to the passenger side of the cab is typical of rollovers where the leading-side (here, the passenger side) sweeps under on the roll and misses the ground, and then the vehicle goes up and over again. While the leading-side misses the contact, the following-side (here, the driver side) contacts the ground on the roll and the roof is crushed inward toward the driver. In Mr. Rempel’s view, the cab damage on the Ford is consistent with a 360-degree rollover of this kind. Further, the mud found on the driver side of the Ford was transferred onto the Ford when the driver side impacted the wet ground in the Ditch.

[130] In Mr. Rempel’s opinion, the lateral scuffs along the passenger side are the result of the Ford’s going past 360 degrees and completing a further ¼ roll, placing the vehicle on its passenger side on the gravelly slope of the Ditch’s far bank. From there, the Ford slid (rear end leading) on its side along the bank until it tilted back to its final position, upright and facing west inside the Ditch.

[131] In Mr. Rempel’s opinion, the vehicle path and progression he posits is consistent with the total damage to the Ford, including the front bumper damage, the scuff marks, the pattern of mud deposit, as well as the estimated speed and the

required roll rate. His estimate for the g force exerted against the vehicle during the furrowing and leading into the trip was 2 g to 3 g.

B. Richards Report dated July 8, 2022

[132] Mr. Richards was qualified as an expert in biomechanical engineering with training and study in rollover accidents. He has significant experience performing crash tests with anthropomorphic test devices (crash test dummies) and using computational models of the human body to study human motion, loading and injury potential in vehicle accidents. His experience includes several years with an independent US research institute performing vehicle safety studies and accident modelling.

[133] Mr. Richards' report was prepared using, among other things, the RCMP file materials, Mr. Rempel's photographs and the Rempel Report (including the PC Crash analysis). He also reviewed the medical records of Mr. Somers and Mr. MacLellan. Mr. Richards testified that he did his own independent review of the collision dynamics for the Accident and agreed with Mr. Rempel's reconstruction.

[134] In Mr. Richards' opinion, the collision dynamics and the nature of Mr. Somers' injuries indicate that he was likely ejected out the passenger side of the Ford. He testified that the roll dynamics make it unlikely the driver could be ejected. In his opinion, an unbelted driver would likely have been thrown into the back row of seats during the Accident.

[135] Mr. Richards describes the forces at play as follows. When the Ford is in yaw and approaching its trip point, both occupants would be pushed forward (toward the dashboard) and rightward (toward the passenger side). At this point, the driver would likely encounter the steering wheel. On the frontal impact with the bank, the occupants would be moved forward and rightward. In Mr. Richards' view, the passenger would likely be up against the passenger side window due to the orientation of the vehicle (now beginning to tilt to the passenger side).

[136] He notes that the passenger side front window was almost fully down during the Accident. Mr. Richards testified that it is unclear whether the passenger occupant could actually go out the window at this point, but in his opinion the occupant would have been pushed right up to the window and may have been partially outside of the open window.

[137] Once the vehicle began a high-intensity rollover, the occupants would tend to move away from the vehicle's centre of gravity. That is, they would each be pushed upward (toward the ceiling) and outward from where they were (toward the Ford's perimeter). In Mr. Richards' opinion, this movement would create an ejection point for the passenger occupant (the "Low Ejection Point"). Ejection at this point would result in the ejected occupant tumbling in the Ditch along the vehicle path with an initial speed in the order of 30 to 40 km/h. This aligns with where Mr. Somers was found after the Accident.

[138] At this same time, the driver occupant would be pushed upward (likely coming into contact with the ceiling) and from there be jostled around as the rolling started. The first ½ roll would crush the roof on the driver side of the cab in toward the steering wheel. In Mr. Richard's view, the roof crush would not create a viable ejection portal for the driver occupant. Although the (mostly closed) driver seat side window would shatter in the crush, the crush also simultaneously pushed the roof down to block the window. The result is that an occupant moving back toward the driver seat would be funnelled downward by the roof and hit the door panel beneath the window opening. Mr. Richards testified that this contact would result in damage consistent with the cracked trim and other contact marks found below the window on the driver seat door panel.

[139] If the passenger occupant was not ejected at the Low Ejection Point, there would be a second opportunity for ejection when the Ford moved into a ¾ roll. The centripetal acceleration would have kept the passenger up against the passenger side of the vehicle during the roll resulting in a high side ejection opportunity at the ¾ roll point ("High Ejection Point").

[140] In Mr. Richards' view, Mr. Somers' final resting position makes the Low Ejection Point more likely what occurred here. While a High Ejection Point is more probable that a Low Ejection Point, a high ejection would likely have thrown the passenger occupant up onto the far bank of the Ditch. This is where some Ford debris, including the passenger side interior floor mat, was found after the Accident. Mr. Richard's evidence is that, while it is possible that Mr. Somers could have rolled down from the bank and into the Ditch in front of the Ford, it is unlikely.

[141] In Mr. Richards' opinion, the marks on the roof liner are characteristic of the kind made when an occupant slides across the roof in the course of a rollover. In particular, he says that of the diagonal mark going from above the driver seat to above the rear passenger side seat. Mr. Richards was unable to offer any opinion as to what part of the body might have caused the marks (e.g., whether a head or a foot).

[142] In Mr. Richards' opinion, the mud splotches on the left hand side of Mr. MacLellan's clothing are consistent with mud having splattered into the vehicle through the driver side windows while Mr. MacLellan was inside the Ford.

[143] Finally, in Mr. Richards' opinion, the Abrasion does not have the characteristics of a seatbelt mark. In his view, the Abrasion is the type of mark that results when a body is in contact with an object while passing by the object (e.g., a steering wheel) or while the object is moving past (e.g., debris moving about in the cab).

C. Moss Report dated July 8, 2022

[144] Rebecca Moss was qualified as an expert in biomechanical engineering and forensic engineering. She has training and experience dealing with rollover accidents and accident reconstruction. She is a part-owner of CEP Forensic and the engineering manager for Western Canada. She provides consulting engineering services and conducts investigations relating to, among other things, injury biomechanics and motor vehicle accident reconstruction.

[145] CEP Forensic has an ongoing services agreement with the insurance company Aviva Canada (“Aviva”). Mrs. MacLellan’s coverage on the Ford was through Aviva. CEP Forensic was initially retained by Aviva on July 4, 2019, “to comment on the seatbelt use and seating positions of the occupants” in the Ford. Mr. Cathcart, a junior engineer with CEP Forensic, was initially assigned the Ford file. He attended and examined the Ford at the impound lot on July 25, 2019. With regard to the vehicle doors, Mr. Cathcart found: the driver seat door was damaged and jammed; the front passenger side door was misaligned but operational; the passenger side rear door would not latch; and the back-driver side door was jammed. The form Mr. Cathcart used did not have a field for recording marks on the roof liner. Mr. Cathcart took measurements of the driver seat position as part of his examination.

[146] Ms. Moss was involved in the file from almost the outset as she provided technical oversight for Mr. Cathcart. Ms. Moss took over the file in February 2022 when Mr. Cathcart left CEP Forensic and a litigation expert report was requested. Ms. Moss testified that she reviewed all of the file information herself, including: Mr. Cathcart’s examination records; the RCMP information and photographs; the medical records of Mr. Somers and Mr. MacLellan, their police statements and their discovery testimony regarding their seated position and seatbelt use.

[147] Unfortunately, she did not review the metadata for the RCMP photographs and did not realize that Cst. Lewis seatbelt photographs were taken before Cpl. Jodoin made his observations. Ms. Moss also intially concluded that the driver side grab bar had been deformed by occupant contact, but after further photographs were reviewed she agreed that it had been deformed in the roof crush. Ms. Moss conceded these points at the outset of her testimony in direct. She testified that none of these changed facts altered her opinion from the conclusions set out in her reports.

[148] Ms. Moss agreed with the general path of the Ford as described in the Rempel and Richards Reports in that she agrees the Ford moved into a counter-

clockwise yaw, there was a furrowing of the wheels, and the vehicle then tripped and rolled at least once and at most twice before coming to rest. She also agreed that 2g was a reasonable estimate of the lateral force on the occupants during the furrowing. Ms. Moss does not agree that the frontal impact with the bank occurred before or after the trip point. In her opinion, the frontal impact could also have occurred after the Ford came back onto its wheels at the end of the roll and there is no way to determine which occurred.

[149] Ms. Moss opines that Mr. Somers was most likely in the driver seat and most likely ejected out the driver seat side window. Her reasoning is set out in her report as follows:

> **Mr. MacLellan's Seating Position**
>
> On the balance of probabilities, Mr. MacLellan was in the passenger's seat at the time of the incident. Mr. MacLellan's injuries were consistent with having worn a seatbelt. He had well-defined abrasions on his lower abdomen consistent with loading from the lap portion of a seatbelt. Also, Mr. MacLellan's shoulder pain was on the right, which was consistent with wearing a seatbelt on the passenger side of the vehicle. CpI. Jodoin reported finding the passenger seatbelt hanging in an extended position, which indicated it had been in use at the time of the collision and he also noted that there was material on the seatbelt and sheen/rubbing on the webbing. CpI. Jodoin also reported that it could be extended and retracted easily. It was photographed after his examination by Cst. Lewis, which was the reason it did not appear extended in the photographs. CEP Forensic's examination of the seatbelt also found the seatbelt retractor and buckle to be functional. Therefore, it was more likely Mr. MacLellan had been situated in the passenger's seat than the driver's seat.
>
> Additionally, a print from the top portion of a right shoe tread was noted on the right side of the passenger-side dashboard. Mr. MacLellan reported during his medical examinations that he had pain in his right ankle and an X-ray of the ankle was taken. This would be consistent with Mr. MacLellan's right foot having been loaded. The pattern of the shoe print was clear on the surface. Therefore, it was not likely from a glancing/sliding contact, but rather created by loading approximately perpendicular to the surface. The shoe print was consistent with being caused by the tread of a Vans shoe, similar to that which Mr. MacLellan was photographed wearing on the night of the incident. Given the above, it was more likely Mr. MacLellan's foot made an imprint on the right side of the dashboard while seated in the passenger seat rather than while seated in the driver's seat and being thrown into the passenger side during the rollover.
>
> Based on the significant roof crush over the driver's seat and its location on the far side of the roll, a belted occupant at this location would have a greater likelihood of head or neck injuries than a belted occupant in the passenger

seat. Mr. MacLellan did not sustain any notable head or neck injuries or abrasions. Near-side non-ejected occupants are less likely to sustain serious injury as compared to far-side non-ejected occupants [5], and the risk of serious injury is significantly reduced for belted and non-ejected occupants.

6.4.2 Mr. Somers' Seating Position

On the balance of probabilities, Mr. Somers was in the driver's seat at the time of the incident. Mr. Somers' injuries and rest location clearly indicated that he had been ejected from the vehicle. Mr. Somers was not wearing his seatbelt at the time of the collision, allowing him to be ejected from the vehicle. CpI. Jodoin reported finding the driver's seatbelt hanging in the retracted position and that it could be extended and retracted easily. Outboard occupants in a rollover will tend to move upward and outward from their seated position initially. Ejected drivers are more likely to exit out the left front area of the vehicle. Ground impacts, occupant contacts, and/or deflection of the roof resulted in shattering of the driver's side window creating a port of exit. During the initial roll, the far-side occupant has more energy upon impact due to the larger radius of their path of travel. Occupants on the far side of the roll are more likely to sustain spinal injuries. The ratio of ejected occupants per non-ejected was higher for far-side than near-side occupants for unbelted occupants. In this incident, the passenger side was leading when the vehicle tripped and, therefore, the driver is the far-side occupant and is at higher risk of ejection and serious injury. Therefore, it [is] more likely that Mr. Somers was the driver.

The measurement of the relative position of the driver's seat to the pedals in the MacLellan Ford indicate, on a balance of probabilities, Mr. Somers was the driver of the vehicle based on his stature and leg measurements. Measurements of the driver's seat and pedal positions taken by CEP Forensic were compared to the statures of Mr. MacLellan and Mr. Somers. The position of the driver's seat at the time of CEP Forensic's examination appeared to be the same as that observed in the RCMP scene photographs. Drivers typically contact the pedals with the ball of their foot and rest their heel on the floor of the vehicle. It was reported in the witness section of the Fort St. John RCMP file that Mr. MacLellan was 5-ft 7-in tall. With the seat in the as found position, Mr. MacLellan's shorter stature would have resulted in his foot being a distance from the accelerator pedal that would have required him to either manipulate the pedals with his toes if he kept his heel on the floor or use the accelerator without resting his foot on the floor. … [T]he position of the seat relative to the pedals would more comfortably fit a driver of the stature and leg length of Mr. Somers than Mr. MacLellan (Drawing 2).

[Footnotes omitted; Emphasis added]

D. Moss Response dated August 19, 2022

[150] Ms. Moss provided a second report responding to the Rempel and Richards Reports.

[151] She provides the following comments:

a) In a rollover sequence “on the order of a few g forces or less and lasting seconds rather than milliseconds”, occupant muscle contraction and resistance can play a non-negligible role in occupant dynamics.

b) With respect to the shattering of the driver seat side window:

> The passenger window was not the only possible port of exit. … The driver’s window was shattered by ground contact, creating an opening. Also, the contact marks, cracked trim and grab bar deformation around the driver’s window indicated it was more likely the port of exit. Also, it was unclear to what extent the driver’s window may also have been open. …

c) There were no contact or loading marks around the passenger side window.

d) The interior damage, including the roof liner damage, could have been caused by objects (as opposed to occupants), noting the debris found at the Accident scene.

e) Mr. Richards’ assertion that the mud splotches on the left side of Mr. MacLellan’s clothing indicate he was the driver is inconsistent with his theory that Mr. MacLellan’s head was up against the ceiling of the cab when the driver side of the Ford hit the Ditch. In her opinion, the mud splotches may have gotten onto Mr. MacLellan’s clothing while he was climbing out of the Ford or looking around for Mr. Somers.

f) The high-impact injuries sustained by Mr. Somers could have been sustained by ejection out of either front side window and therefore are not indicative of which window it was.

[152] Finally, she comments on Mr. Richards’ opinion with respect to the Abrasion:

> The conclusion that the abrasion on Mr. MacLellan's abdomen was not from a seatbelt by comparison to expected seatbelt loading marks from frontal collisions was not appropriate for rollover collisions. The photograph of the abdominal abrasion on Mr. MacLellan was out of focus: therefore, the distinct characteristics of the abrasion cannot be assessed. The location on the abdomen was not entirely clear, but the full body photographs of Mr. Maclellan indicated that his pants may ride low, and the small shadow at the top of the exposed portion of the abdomen and line of abdominal hair suggested that the belly button was at the location of the shadow. Therefore,

> the abrasion was likely on the lower abdomen rather than the middle as described in the [Richards] report. The lower abdomen was also referenced as the abrasion location in the RCMP file (pages 5 and 9 of the Application for a Search Warrant). This likely would be too low of a location for steering wheel contact for an occupant projected toward the passenger side of the vehicle in the pre-trip portion of the accident as described by the [Richards] Report. The line was also horizontal, which if it occurred as the occupant was moving forward and to the side as described by the report, it would have been more at an angle. The [Richards] Report also acknowledges that the abrasion could have resulted from a different contact mechanism within the vehicle other than the steering wheel and that rollover seatbelt loading would be less than frontal collision loading. Therefore, loading marks would be less distinct. All the example images of abdominal seatbelt loading marks provided in the [Richards] Report were taken from Greenstone et al., 2019 for high-severity frontal impacts and cannot be compared to this lower severity rollover collision. Greenstone et al, 2019 specifically mentioned that the paper does not discuss occupants with properly positioned seat belts who sustain out-of-position seat belt loading marks, which can occur when there is significant rotation in a planar crash or rollover events.

[153] Ms. Moss concludes that nothing in the Rempel or Richards Reports alters her conclusions.

E. Richards Response dated August 17, 2022

[154] In response to the Moss Report, Mr. Richards notes that the cracks and scratches in the driver side interior door panel show glass was between the panel and the occupant that hit the panel, indicating that the driver seat side window had shattered before the impact. He states the embedded glass is consistent with the occupant having moved toward the passenger side with the pre-rollover lateral forces, and then moved back toward the driver side after the roof crush, when glass was already on the door panel and the crushed roof would have funnelled the occupant down to the bottom half of the door.

[155] He also responds to her opinion that the Abrasion is a seatbelt mark:

> Mr. MacLellan had a well-defined abrasion on his abdomen, however the nature and location of the abrasion do not appear to be consistent with seatbelt loading. Research on seatbelt interaction indicates that seat belts typically leave compression type marks over the abdomen that extend to the lateral edges of the torso with pressure points on the anterior superior iliac spines of the pelvis (Greenstone et al, 2019; Hayes, 1991). Seatbelts do not typically leave acute abrasions to the middle of the abdomen. In a rollover accident, like the subject accident, it is expected that the lap belt would

> interact lower on the pelvis as the occupant is projected upward and outward. In my opinion the abrasion on Mr. MacLellan's abdomen is not likely from a seatbelt.

IV. Analysis: Driver Identity

A. The Abrasion

[156] Ms. Moss argues that seatbelt marks in rollover accidents do not necessarily share the characteristics of seatbelt marks in frontal collisions and that Mr. Richards is wrong to equate them. She also takes issue with whether his description of the location of the Abrasion as being in the "middle of the abdomen".

[157] Reading the Richards Report and Richards Response in conjunction, it is my view what Mr. Richards is stating is that the Abrasion does not comport with his expectations for a rollover seatbelt mark. Further, I am satisfied that he has extensive experience and expertise on the point.

[158] Mr. Richards has conducted research studies involving the simulation of rollover accidents and analysis of real-world rollover accidents. This includes studies focussing on restrained and unrestrained occupant kinematics and seatbelt interactions in rollovers. He testified to having studied over 200 real-life rollover accidents. His published peer-reviewed articles include ones dealing with seatbelt effects on occupant kinematics during rollovers, occupant mechanics in rollover simulations, the evaluation of surrogate human models for rollovers, and a computational method for predicting occupant motions during rollovers. His expectations as to what a rollover seatbelt mark would look like in the circumstances are grounded in experience.

[159] Mr. Richards agrees that rollover accidents do not necessarily leave any seatbelt markings. His opinion, however, is based on his expectations for what a rollover mark look like if it were sustained here. The fact that he referenced frontal collision studies in the course of explaining his expectations for a rollover mark would look here does not amount to his saying that frontal collision and rollover marks are identical. He was illustrating the type of mark he would expect to result

from the application of upward and outward forces in a rollover. He would expect the mark to be lower and extend to the sides.

[160] Mr. Richards also testified that, in his view, the intense red spot within the Abrasion is indicative of an initial friction point being encountered during a passing over scenario. Thus, his opinion is not merely that it is not what he would expect from a rollover, but rather a mark consistent with a quite different kind of interaction.

[161] In an anatomical sense, Ms. Moss' observation that "lower abdomen" would be more accurate than "middle of the abdomen" seems fair. However, that is not the important part of Mr. Richards' comment. As I read it, his point is that he would expect the rollover force dynamics to have resulted in a mark extending into the pelvic area, not one up where the Abrasion is.

[162] Constable Dreyer testified that the reason he asked Mr. MacLellan to let him look for seatbelt marks. In the photograph, Mr. MacLellan's sweatshirt is raised all around his torso and his waistband is somewhat pushed down. Mr. MacLellan clearly cooperated. Mr. MacLellan returned to FSJH later on March 23rd and was fully examined. There is no evidence that any further marks were noted then. Neither Mr. MacLellan nor Ms. Lays testified that Mr. MacLellan had marks on his torso aside from the Abrasion.

[163] Cst. Dreyer's photographs are hardly professional standard, but they are sufficiently clear to provide a basis for Mr. Richards' observations on the Abrasion and to enable the Court to evaluate those observations.

[164] I am satisfied that the Abrasion is not a seatbelt mark. The actual cause of the Abrasion is not established by the evidence.

B. Mr. MacLellan's Exit from the Ford

[165] Mr. MacLellan testified that when he heard Mr. Somers yelling, he got out of the Ford as quickly as he could. He said he tried the door, but "the roof was

crunched down in on the truck" and the door was "crunched shut." He said the next quickest way out was through a "smashed out" window, and so he did that.

[166] Had Mr. MacLellan been belted into the front passenger seat, he would have been right beside the front passenger door. That door was not "crunched." Aside from a lost side mirror and exterior scuffing, the front passenger door was intact. Mr. Cathcart confirmed the door was operational as of July 2019. On cross-examination, Ms. Moss agreed that if it opened for Mr. Cathcart, it ought to have opened at the Accident scene.

[167] Mr. MacLellan specifically stated that he went out through a smashed out window. The front passenger window was intact, not "smashed out". The windshield was still partially intact and partially connected on the passenger side of the cab. Thus, if the plaintiff found himself in the passenger seat and went out through a smashed out window, he had to climb into the back row to do that. That would have been neither easy nor quick (especially when the front passenger side window was nearly rolled down).

[168] I conclude that Mr. MacLellan was not in the front passenger seat when he came to following the Accident, from which it follows that he was not sitting belted in the front passenger seat beforehand.

C. Driver Seat Adjustment Settings

[169] Ms. Moss relies on the driver seat settings in concluding that Mr. Somers was the driver. In my view, the driver's seat settings are unreliable evidence of driver identity.

[170] First, the studies she relies on with respect to driver seat adjustments in relation to driver height disclose significant outliers. This is unsurprising given that height is only a rough proxy for limb length. Here, Ms. Moss did not obtain precise measurements for Mr. MacLellan. In fact, Mr. MacLellan's height was taken from a witness report in the RCMP file.

[171] Second, I am not satisfied that the seat was in the same position when Mr. Cathcart took his measurements as it was at the time of the Accident. I do not find Ms. Moss' observation that it "appears" to be in the same place based on her visual comparison to RCMP photographs reliable. This especially so given that things appear to have been moved over time (e.g., seatbelts, the steering wheel) and Mr. MacLellan's evidence indicates that a search of the Ford was done at the impound lot.

[172] I am not prepared to put any weight on the driver's seat settings in determining driver identity.

D. Glass on the Plaintiff

[173] The defendants argue that the fact that Mr. Somers had glass in his ear and the side of his head after the Accident is consistent with ejection through the driver side window.

[174] There is no reliable evidence that glass was found in Mr. Somers' ear and head after the Accident. The only evidence that glass was found is hearsay evidence from Mr. Somers based on the statements of an unidentified person. Mr. Somers gave some testimony expanding on the nature of the glass, but it was expanding his understanding of the hearsay. Mr. Somers has no independent recollection of glass in the aftermath of the Accident (and, if he did, it would not be reliable given his condition between the time of the Accident and the completion of his surgeries).

[175] No glass is noted as present or being removed in Mr. Somers' medical records. There were some photographs taken of Mr. Somers on the ambulance stretcher. No glass or visible cuts can be seen.

[176] Finally, even if there were evidence of glass, nothing is known of its type and thus its source. I note that Mr. MacLellan testified that there was debris in the Ditch from before the Accident. This is to some degree supported by Cst. Lewis testimony that she found multiple containers at the Accident scene which are not accounted for by the Liquor Store purchases.

E. Ejection Opportunities

[177] The facts agreed to at trial, taken in combination with findings reached above, take away the factual basis for Ms. Moss' conclusion that Mr. Somers was, in fact, driving. However, as noted in the introduction, there is no burden on the defendants to establish that Mr. Somers was driving.

[178] Ms. Moss' opinion that it was possible for the driver of the Ford to be ejected out the driver seat side window warrants consideration. (No expert took the position that the plaintiff could have been ejected through any window other than the driver seat side window or front passenger side window.)

[179] In Mr. Richards' opinion, it is unlikely that the driver could have been ejected out the driver seat side window. In Mr. Richards's view, pre-rollover, an unbelted driver would have moved up and toward the passenger compartment at about 2-3 g forces. That is so whether or not the frontal impact had already occurred. The Ford would also begin tilting to the passenger side. Once it became a high-intensity roll, a driver occupant on the driver side of the Ford's centre of gravity would then be pushed back toward the driver side. However, the ground contact on the first ½ roll crushed the roof down, closing off the window and funnelling anything going toward the driver side down to the bottom part of the door. Significantly, there is embedded glass in the lower door panel, indicating roof crush came prior to the impact against the panel.

[180] In her first report, Ms. Moss says the driver side front window might have been broken by occupant contact. However, in her response report she specifically states that it was "shattered by ground contact". In any event, what is lacking is any explanation of how the driver occupant (or, for that matter) a lose object would have been brought to the driver side prior to the roof crush. (Further, Mr. Somers, who is six feet tall, would have had to be fully ejected through the driver seat window before the crush, as he suffered no crush injuries.)

[181] I agree with Mr. Richards that it is improbable that the driver occupant could have been ejected out the driver seat side window, especially given the presence of

glass in the lower door panel. I also accept Mr. Richards' evidence that there were two viable opportunities for the passenger occupant to be ejected out the front passenger side window. While there are no typical exit markings along the passenger side window, there is a satisfactory explanation for that – the Ford has truck-sized windows and the passenger side window was almost fully open, making a clean ejection possible.

F. The Decision to Take the Ford

[182] Mr. Somers and Mr. MacLellan planned to go get more alcohol and come back to the House. They went using the Ford. So, why the Ford?

[183] Mr. Somers and Mr. MacLellan both testified that there is nothing interesting about the Ford (e.g. it was not new, it was not fast) such that Mr. Somers would have wanted to experience driving it.

[184] In his direct examination, Mr. MacLellan testified as follows:

> Q Sir, how is it that the trip downtown that night came to be made in your mother's truck?
>
> A I believe that Mr. Somers' vehicle had issues with it.
>
> Q And how was the decision made as to who was going to drive that evening?
>
> A I had had too much to drink, and I did not want to drive.
>
> Q Sir, what can you tell the court about the level of Mr. Somers' sobriety that evening?
>
> A He was intoxicated as well.

[185] Significantly, in the plaintiff's testimony, the plaintiff expressly and squarely asserted that there was absolutely reason for him to be driving the Ford. Notwithstanding, the quote above is Mr. MacLellan's testimony in response. Notably, Mr. MacLellan did not identify provided any basis for his asserted belief about the Chevy. He did not, for example, say the hood was open or there were tools sitting beside it. He also did not testify that Mr. Somers told him there were issues or said that the Chevy was unreliable.

[186] I find it implausible that Mr. MacLellan would let Mr. Somers drive the Ford without there being at least some discussion between them about the reason for proceeding that way.

G. Side Window Adjustments

[187] Mr. MacLellan has consistently said that his side window was “cracked open” on the drive. He subsequently elaborated upon the meaning of that by saying he meant there was enough room to put his hand out to throw away a cigarette butt or six to eight inches down from the top.

[188] There are photographs in evidence showing the glass bits remaining in the window edging after the window was smashed out. Mr. Richards testified that the height of these remnants reveals how high the window was rolled up at the time it shattered. I accept Mr. Richards evidence in that respect. The photographs of the remnants indicate that the driver seat side window was open about six to eight inches at the time it shattered. In comparison, the intact front passenger side window was only about four inches or so up from the bottom.

[189] Mr. MacLellan gave discovery evidence about his side window being cracked open on November 23, 2021. That date precedes the expert reports. Corporal Jodoin’s notes and report indicated the driver seat side window was broken out, but failed to note that the front passenger side window survived intact. At the time of that discovery, Mr. MacLellan had no reason to suppose the window adjustments could be discerned and no reason to fabricate an answer.

[190] Further, I am satisfied that Mr. MacLellan’s testimony about his side window is reliable. The tenor of his trial testimony was that he adjusts his window in that manner habitually:

> Q So I asked you earlier about your discovery evidence that you had your window cracked?
>
> A M'mm-hmm.
>
> Q I'm going to suggest to you that cracked means that the window was down an inch or two?

> A Yeah, anywheres from -- I'm a smoker so I would have had it down enough to throw a cigarette butt out the window, would have been anywhere from six to eight inches, wherever your hand can fit out through the hole to throw a cigarette out the window.
>
> Q So it was most of the way up but maybe six or eight inches down at the top?
>
> A Yeah.

H. Conclusion on Driver Identity

[191] On the totality of the evidence and taking into consideration all of my findings above, I am satisfied on a balance of probabilities that Mr. MacLellan was driving the Ford at the time of the Accident. Neither Mr. MacLellan nor Mr. Somers had a seatbelt on, which turned out to be good luck for Mr. MacLellan and very bad luck for Mr. Somers. Mr. Somers was ejected through the open front passenger side window and Mr. MacLellan was thrown towards the passenger side in way that allowed him to avoid the roof crush.

[192] I note that I do not rely on the hospital records from Mr. MacLellan's March 23, 2019, visit in coming to this conclusion. I accept Mr. MacLellan's evidence that he did not tell the nursing staff that he had been "ejected" during the Accident. I find it very unlikely that Mr. MacLellan, as a matter of vocabulary and manner of speech, would ever describe his being thrown around in the cab as being ejected or partially ejected.

[193] I also find that the mud splotches on the left hand side of Mr. MacLellan's clothing are consistent with there being no one between Mr. MacLellan and the driver side windows when the driver side hit the Ditch. I do not accept Ms. Moss' evidence that these splotches could have occurred while climbing out of the Ford, as the splatter pattern indicates flying mud. That said, I put relatively little weight on this consideration, as it is simply a matter of consistency.

[194] As set out in the introduction, it was not contested that whoever was driving was in breach of a duty of care and that damages were suffered as a result of the

Accident. Thus, being held to be the driver at the time of the Accident, Mr. MacLellan is liable for those damages.

V. Contributory Negligence

A. Legal Framework

[195] Even where a defendant is found liable, a plaintiff's damages may be reduced on the basis that he failed to use reasonable care and/or take proper precautions for his own safety. The analysis for contributory negligence involves two considerations: (1) whether the plaintiff failed to take reasonable care in his own interests; and (2) if so, whether that failure was causally connected to the loss he sustained. The onus is on the defendants to prove contributory negligence on a balance of probabilities.

[196] In confirming that analysis, the Court of Appeal (per McDonald J.A.) in *Wormald v. Chiarot*, 2016 BCCA 415 at para. 15, stated:

> To satisfy the requirement of a causal connection between the plaintiff's breach of the standard of care and the loss sustained, the defendant must establish more than that but for her negligence, the damage would have been avoided. The plaintiff's conduct must be a "proximate cause" of the loss in that the loss results from the type of risk to which the appellant exposed herself: *Bevilacqua v. Altenkirk*, 2004 BCSC 945 at paras. 39–43 (per Groberman J., as he then was). In other words, the plaintiff's carelessness must relate to the risk that made the actual harm which occurred foreseeable: *Cempel v. Harrison Hot Springs Hotel Ltd*. (1997),1997 CanLII 2374 (BC CA), 43 B.C.L.R. (3d) 219, [1998] 6 W.W.R. 233 (C.A.) at para. 13.

[197] The court must look to the circumstances of both parties' misconduct in order to determine their relative degrees of fault or blameworthiness. In *Cempel v. Harrison Hot Springs Hotel Ltd*. (1997), 43 B.C.L.R. (3d) 219, 1997 CanLII 2374 (C.A.) at para. 19, the Court of Appeal stated:

> The *Negligence Act* requires that the apportionment must be made on the basis of "*the degree* to which each person was *at fault*." It does not say that the apportionment should be on the basis of the degree to which each person's fault *caused* the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances.
>
> [Italics emphasis in original.]

B. Pleadings Dispute

[198] The defendants' response to amended notice of civil claim asserts that the plaintiff's injuries would have been lessened by wearing a seatbelt and that the plaintiff willingly accepted the risk of injury by riding with a driver he knew or ought to have known was impaired.

[199] In closing submissions, the defendants also argued that Mr. MacLellan and Mr. Somers were joint participants in a hazardous activity on the basis that the two were drinking together at the House before setting out, and that Mr. Somers encouraged Mr. MacLellan to drive faster, which contributed to the cause of the Accident and the severity of injury. The plaintiff responded on the merits, but objects that joint participation in a hazardous activity and encouragement are required to be expressly pled.

C. Failure to Wear a Seatbelt

[200] The elements of contributory negligence as they relate to the failure to wear a seatbelt are as set out in *Gagnon v. Beaulieu*, [1977] 1 W.W.R. 702 at 707–708, 1976 CanLII 1565 (B.C.S.C.):

> (a) Failure, while travelling in a motor vehicle on a street or highway, to wear a seat belt or any part thereof as provided in a vehicle in accordance with the safety standards from time to time applicable is failure to take a step which a person knows or ought to know to be reasonably necessary for his own safety.
>
> (b) If in such circumstances he suffers injury as the result of the vehicle being involved in an accident, and if it appears from the evidence that if the seat belt had been worn the injuries would have been prevented or the severity thereof lessened, then the failure to wear a seat belt is negligence which has contributed to the nature and extent of those injuries.
>
> (c) In the case of this particular form of contributory negligence, the onus is on the defendant to satisfy the court, in accordance with the usual standard of proof, not only that the seat belt was not worn but also that the injuries would have been prevented or lessened if the seat belt had been worn. The court should not find the second of these facts merely by inference from the first, even if that has been established.

[201] See also, *Koopman v. Fehr*, [1993] B.C.W.L.D. 1834 at paras. 11–12, 1993 CanLII 2065 (C.A.); *Fitch v. Prosko*, 11 B.C.L.R. at para. 18, 1979 CanLII 385 (S.C.).

[202] The expert evidence establishes that the front passenger seatbelt was in working condition. Mr. Somers concedes that he saw it there and, in fact, testified that he moved it aside while getting into the passenger seat at one point that evening. He testified that he chose not to wear the seatbelt because he felt they were not going far and were using a back road.

[203] The defendants rely on the Richards Report as evidence that wearing a seatbelt would have lessened the severity of Mr. Somers' injuries. Mr. Richards concludes that the plaintiff's injuries are indicative of "multiple high energy ground impacts as he tumbled to his resting position". In particular, the defendants contend that Mr. Richards indicates that the plaintiff's most serious injury – the T12 fracture dislocation that caused his paraplegia – was likely caused by "a high energy impact with his body in posture to cause significant flexion distraction at the T11-12 region". The defendants submit that the logical conclusion of Mr. Richards' evidence is that, if Mr. Somers had not been ejected and suffered a high energy ground impact, the T12 fracture would likely not have occurred. The defendants seek a 25–30% reduction in liability, citing *Florence v. Shackelly*, [1999] B.C.J. No. 163, 1999 CanLII 6505 (S.C.) [*Florence*] and *Suran v. Auluck*, 2017 BCSC 472.

[204] Mr. Somers argues that the defendants have failed to discharge their onus to establish on a balance of probabilities that wearing a seatbelt would have prevented or minimized his injuries. He relies, in particular, on the points outlined in the following passage from *Terracciano (Guardian ad litem of) v. Etheridge* (1997), 33 B.C.L.R. (3d) 328, 1997 CanLII 4357 (S.C.) [*Terracciano*]:

> [63] In this case, the defendants submitted the engineering report of Mr. King which describes the state of the rear window and seat belts, and says:
>
> > Although we do not know the precise form of the injuries sustained, the preliminary information and statistical work we have done on roll-over accidents indicate that Elizabetha [sic] Terracciano and Andrea Moschetti would probably have benefited from use of the available seat belts by being kept in the Fuji vehicle as it tumbled. The potential for serious injury increases significantly for a passenger who is ejected rather than contained.
>
> [64] This opinion, the only evidence directly on the issue, is of a general nature and essentially unhelpful in resolving the factual issue in this case. It

> states no more than what most well-read individuals know, that if one is belted, one will not sustain injury from ejection. It does not assist in showing, in this case, whether the injuries were sustained inside the vehicle or as a result of ejection from the vehicle. In the event the injuries were sustained inside the vehicle by, for example, contact with the roof, it is possible a seat belt would not have prevented or lessened the injuries. If, on the other hand, the injuries were sustained as a result of ejection, then failure to wear a seat belt is likely causative, in part at least, of the injuries.
>
> [65] The spinal cord injury of Ms Terracciano was a wedge compression fracture, indicating axial loading from above or from below, with some degree of flexion. I do not know from the evidence whether it is more likely than not that Ms Terracciano sustained these injuries by hitting the roof of the car as it rolled, by striking the front seats when flexed forward or by landing on the ground. The defendants refer to common sense. However common sense tells one that a wedge compression fracture may occur inside a small vehicle, even with lap belt restraint, or on landing outside the vehicle. So too, a head injury may occur inside or outside the vehicle.
>
> [66] In the circumstances of this case, it would be speculation to say that the injury was sustained or exacerbated because Ms. Terracciano did not wear a seat belt.
>
> [Emphasis added.]

[205] Mr. Somers further submits the variables and dynamic complexity of the Accident are such that the defendants cannot establish causation in terms of prevention or minimization without expert evidence on the point: *Parlby v. Starr*, 2017 BCSC 2353 at paras. 236–37.

[206] Dr. Richards' evidence makes this case comparable to *Florence*, where the Court was satisfied that the C-6 burst fracture resulting in spinal injury took place outside the vehicle and due to loading that took place when the plaintiff struck the ground surface: see paras. 38–44. Dr. Richards' expert opinion is that the T12 fracture was due to high energy impact and that Mr. Somers suffered high energy impacts from ground contact. I agree that that amounts to saying that it is more likely than not that the T12 fracture would not have occurred had Mr. Somers been wearing a seatbelt and not impacted the ground. I accept that preventing the T12 fracture would have lessened Mr. Somers' injuries.

[207] The front passenger compartment area fared very well in the Accident. However, Mr. Somers relies on Mr. Richards' observation that the passenger might

have been partially ejected – that is in part protruding from the open passenger side window – during the lead up to the trip. On that basis, he contends that even with his seatbelt on, he would have been at risk of crushing injuries to his head, upper body or arms in the course of the rollover. He cites *Mclaren v. Rice*, 2009 BCSC 1457 at paras. 44–45 [*Mclaren*], as an example of contributory negligence being dismissed on this basis.

[208] Mr. Richards' observation about a potential partial ejection through the open window was made with respect to an unrestrained passenger occupant. Further, and in any event, the assertion that the plaintiff might have suffered the T12 fracture, or some other comparably serious injury, while wearing a seatbelt is pure speculation.

[209] The plaintiff's reliance on *Mclaren* is also misplaced. There, the Court found that Mr. Mclaren could have sustained the injury actually sustained either while belted into his seat or, being unrestrained, on ejection. That factual finding was doubly fatal to the defendants' case for contributory negligence. First, the defendants were relying on the type of injury sustained as evidence that Mr. Mclaren was not, in fact, wearing a seatbelt. (Mr. Mclaren's evidence was that he was.) Second, there was no basis on which to argue that a seatbelt would have prevented the injury actually sustained from occurring. The court in Mclaren did not speculate that Mr. Mclaren might possibly have suffered some other injury if he had had his seatbelt on.

[210] Here, I conclude that the plaintiff's own negligence in failing to wear his seatbelt contributed to his injuries.

D. Riding with an Impaired Driver

[211] The defendants also contend that the plaintiff was negligent in riding with an impaired driver. A helpful summary of the relevant law is found in *Telford v. Hogan*, 2014 BCSC 1925 [*Telford*]. There, Justice Fitzpatrick wrote:

> [83] ICBC alleges that Ms. Telford was contributorily negligent by failing to take reasonable care for her own safety by riding as a passenger in the vehicle where she knew or ought to have known that Ms. Hogan had consumed alcohol and was impaired.

> [84] In *Gilbert v. Bottle*, 2011 BCSC 1389, the court was addressing a similar issue. Madam Justice Dickson summarized the task of the court in assessing whether the defendant has satisfied the onus of establishing contributory negligence on the part of the plaintiff in these circumstances:
>
> > […]
> >
> > [26] A plaintiff may also be found to have failed to take reasonable care for his or her own safety by accepting a ride with an intoxicated driver when the plaintiff knew or should have known of the driver's intoxication when the ride was accepted. An objective assessment of all of the circumstances is required and, where the plaintiff joins the defendant in becoming intoxicated, liability may be imposed taking into account their joint participation in a hazardous enterprise. In such cases, the plaintiff is often held to be 25% to 40% contributorily negligent: *Pottage v. Patterson* (1980), 24 B.C.L.R. 43 +(S.C.); *Walsh v. Gougeon*, [1989] B.C.J. No. 1446 (S.C.); *Neufeld v. Foster*, 1999 CanLII 6939 (BC SC), [1999] B.C.J. No. 764; *Holton v. MacKinnon*, 2005 BCSC 41.
>
> [85] Both Ms. Telford and ICBC have relied on a number of authorities. I will not discuss each case in any great detail as the factual circumstances of each must necessarily have dictated the result and are distinguishable from the unique facts here. Nevertheless, consistency is found in these cases in identifying certain relevant factors:
>
> a) the plaintiff's knowledge of the defendant's consumption of alcohol and degree of impairment;
>
> b) the plaintiff's ability to observe and appreciate the defendant's ability to drive at the relative times, being when she got into the vehicle and immediately prior to the accident; and
>
> c) if, having appreciated the risk she was in, the plaintiff had an opportunity to remove herself from the vehicle.

E. Events Prior to Departing from the House

[212] The defendants assert that Mr. Somers chose to ride in the Ford when he knew or ought to have known that Mr. MacLellan was impaired. They also contend that the two men should be considered joint participants in a hazardous activity because they were drinking together at the House before setting out in the Ford.

[213] The plaintiff argues that the defendants have neither established that Mr. MacLellan was intoxicated nor that Mr. Somers knew or ought to have known that Mr. MacLellan was intoxicated.

[214] Accordingly, findings of fact must be made with respect to when Mr. MacLellan and Mr. Somers were at the House together and how much they drank while they were there.

[215] The first question is when Mr. MacLellan arrived at the House, making it necessary to determine the time at which the eight-minute phone conversation took place during which Mr. Somers invited Mr. MacLellan over to the House (the "Invitation Call"). As already set out, both phone records show an eight-minute call initiated by Mr. MacLellan. In Mr. MacLellan's records, that outgoing call begins at 7:06 PM; in Mr. Somers' records, that incoming call begins at 8:06 PM.

[216] Neither side put in evidence that would enable the Court to determine why the sets of phone records differ in this respect. No phone company representatives were called to speak to the issue and, apparently, neither company was asked to produce third party records. Theories based on different implementations of daylight savings time, as between BC and Alberta, in the Mountain Standard Time zone were floated by counsel, but there is no evidence as to which governments were doing what when the Accident occurred nor any explanation of how this could actually explain the time difference given that both parties were in British Columbia and the general area of Fort St. John when the call took place.

[217] Also notable is the fact that neither side entered into evidence the phone records of other persons who had calls with the parties on the day of the Accident (e.g., records from Mr. Comeau or Ms. Lays).

[218] On the evidence that is before me, I find as follows. Mr. MacLellan was called by Mr. Somers while he was riding back to Fort St. John from Mile 120 and in the vicinity of Charlie Lake. These are the two 7:18 PM calls that Mr. MacLellan did not pick up. Mr. MacLellan then continued the rest of the ride into Fort St. John and Chad's house, and moved his gear into the Ford. The Invitation Call took place after Mr. MacLellan was back and leaving Chad's place again. Mr. MacLellan, having checked his phone, then made a return call (i.e., the Invitation Call) to Mr. Somers. That would have been at 8:06 PM.

[219] Plaintiff's counsel disputed Mr. MacLellan's assertion that the drive back into Fort St. John from Mile 120 was paid time. This was in service of the plaintiff's argument that Mr. MacLellan did not depart Mile 120 until after his recorded paid work hours were at an end and on this basis, contends that Mr. MacLellan did not arrive at the House until after 9:00 PM.

[220] Plaintiff's counsel's assertion about paid time were based on his interpretation of Full Bore's service contract with the company running the Mile 120 project. Mr. MacLellan's employment terms are set between him and Full Bore, not dictated by the terms of Full Bore's service contract with a third party. Mr. MacLellan explained why Full Bore was prepared to pay travel time for Fort St. John employees working at the Mile 120 site. His explanation is a reasonable one.

[221] I conclude that the Invitation Call started at 8:06 PM and that Mr. MacLellan was in or at least about Fort St. John proper at the time of the call. Mr. MacLellan headed over to the House right after the Invitation Call and thus arrived by 8:30 PM. This accords with Mr. Somers' evidence at his November 2021 discovery (i.e., prior to his revisions), at which time said that Mr. MacLellan arrived between 8:00 and 8:30 PM.

[222] The evidence does not enable me to opine on why there is a discrepancy in the records, but I find that Mr. MacLellan's phone records, which show the eight-minute Invitation Call taking place at 7:06 PM, are incorrect on the point. As set out in Mr. Somers' records, the call took place at 8:06 PM.

[223] I reject, however, plaintiff counsel's assertion that it follows from that that all of the calls listed on Mr. MacLellan's records took place one hour later than the time shown on those records. As the parties have not put the Court in a position to determine the reason for and nature of the discrepancy in the records, there is no rational basis for assuming that it impacts all of the calls. I also put no stock in Mr. Somers' testimony that Mr. MacLellan did not call Chad after he arrived at the House. (Mr. Somers has proven unable to account for even his own time and

conduct after Mr. MacLellan's arrival.) In any event, Mr. MacLellan could also have phoned Chad while he was driving to the House.

[224] I also accept Mr. MacLellan's and Ms. Lays' evidence about the timing of Mr. MacLellan's call to Ms. Lays and that it was a speaker phone call and Mr. Somers was present and could be heard by Ms. Lays. Ms. Lays is credible and it makes sense that Mr. MacLellan would call her before her established bedtime to let her know that he would not be coming home. I find that Mr. MacLellan made that call at 9:57 PM and just before the drive into Fort St. John.

[225] Given that I find that Mr. MacLellan's phone records accurately show the time of his call to Ms. Lays, there is no reason to presume the two call entries behind it (shown as placed at 10:05 and 10:07 PM), are incorrect. (It follows that the plaintiff has failed to establish the very serious allegation that Mr. MacLellan made phone calls using his phone at the scene of the Accident (i.e., at 11:05 and 11:07 PM).

[226] Thus, Mr. MacLellan arrived at about 8:30 PM and they left in the Ford to go into town at about 10:00 PM. (This also aligns with Mr. Mitchell's testimony about his arrival and departure from the House.) Thus, Mr. MacLellan and Mr. Somers were together at the House for some 90 minutes before heading out in the Ford.

[227] In his direct evidence at the trial, Mr. Somers testified that Mr. MacLellan arrived at about 9:15 PM and had nothing to drink before they left to go into town. Again, his testimony was not a recollection, but an after the fact reconstruction:

> Q Okay. As you were showing him around the house, were you drinking?
>
> A Yeah.
>
> Q What were you drinking?
>
> A I was drinking a Palm Bay.
>
> Q Did you offer anything to Richard?
>
> A I didn't have anything left there at the time or I would have for sure.
>
> Q Why do you think you didn't have anything left?
>
> A Before, like, when the accident happened, I thought my blood alcohol would have been higher -- or sorry, lower. And when I had seen that it was, in

> fact, higher, it leads me to believe that I drank -- or I would have been drinking the sixth one when I was giving him the tour around the house.
>
> Q Did he drink anything while he was at house there with you?
>
> A Not while he was at the house, no. We were only there for 30 minutes or so before we went up into town.
>
> …
>
> Q Had you observed up to that point Richard have anything to drink at your house?
>
> A No, he didn't. No.
>
> Q Had you offered him anything to drink?
>
> A Had I had something there, I would have offered him, but I didn't have anything left.
>
> Q Okay. Had you had any of your -- of the Fireball that evening?
>
> A I don't think so. I don't remember taking a drink of it at that point, but it's possible, I guess.
>
> Q Did you have any of the Fireball with Mr. MacLellan?
>
> A No, I didn't. No.

[228] On cross-examination, Mr. Somers agreed that he drank three to four cans of Palm Bay between 6:30 and 8:30 PM. My finding regarding the time of Mr. MacLellan's arrival at the House presents a clear problem for Mr. Somers' reconstruction. As Mr. MacLellan arrived by 8:30 PM, Mr. Somers did have drinks to provide to Mr. MacLellan – both Palm Bays and Fireball.

[229] I reject Mr. Somers' testimony about what they did at the House. I find that the drinking at the House took place as described by Mr. MacLellan: i.e., both had a number of canned drinks and both had some Fireball. This is consistent with the fact that Mr. Somers bought a new bottle of Fireball on the trip to the Liquor Store. It is also consistent with Mr. Somers' having told Dr. Purtzki (the defendants' physiatry expert) that he and Mr. MacLellan had "a few drinks" at his property prior to the Accident.

[230] Both Mr. MacLellan and Mr. Somers deny drinking in the Ford on the way to or from the Liquor Store and there is no credible evidence to the contrary.

F. Knowledge of Consumption and Degree of Impairment

[231] It is not sufficient to simply establish that the plaintiff knew the defendant driver had had some alcohol: *Dennis v. Gairdner*, 2002 BCSC 1289 at para. 44; *Telford* at para. 85. The question is what the plaintiff knew about how much alcohol had been consumed and about the degree of impairment.

[232] Mr. Somers testified that the bottle of Fireball was 375 ml. Mr. Somers' charges for his after-work purchases and his subsequent purchases at the Liquor Store were roughly equal in price. The size of the bottle of Fireball found by Cst. Lewis at the Accident scene was 375 ml. I conclude that the bottle of Fireball they had at the House was, in fact, a 375 ml bottle.

[233] Mr. Palfy spoke with Mr. MacLellan at the Accident scene. He described him as coherent although in shock. He did not describe any signs of impairment. Constable Lewis noted that Mr. MacLellan and the Ford smelled of alcohol, but nothing further. Constable Dreyer noted that Mr. MacLellan had watery eyes and smelled of alcohol, but nothing further (e.g., slurring, balance, motor skills).

[234] Counsel for the defendants notes that Cst. Dreyer commented that he had difficulty keeping Mr. MacLellan on topic while talking to him at the Accident scene. I do not accept that as evidence of impairment. It could be due to many causes, such as his being in shock or distraught or distracted by concerns about the Accident.

[235] There is no evidence of noticeable impairment. Mr. MacLellan's testimony indicated that he is a regular and experienced drinker. There is no evidence before me that would enable me to conclude that Mr. Somers ought to have known that Mr. MacLellan was too impaired to be driving and that it would be unsafe to ride with him.

G. Joint Participation in a Hazardous Enterprise

[236] The defendants' argument that, because Mr. Somers and Mr. MacLellan were drinking together before heading out in the Ford, they jointly participated in a hazardous enterprise cannot succeed in light of my findings with respect to

Mr. Somers' knowledge of Mr. MacLellan's consumption of alcohol and degree of impairment.

H. Encouragement to Increase Speed

[237] This leaves the defendants' assertion that Mr. Somers encouraged (or perhaps goaded) Mr. MacLellan to drive even faster by asking whether that was all the engine power the Ford had. The defendants' case in this respect rests entirely on Mr. Somers' account of the moments leading up to the Accident.
(As Mr. MacLellan denied driving, there is no competing version as to how or why Mr. MacLellan lost control of the Ford.)

[238] The defendants' argument cherry-picks a single strand out from the conversation Mr. Somers' described. Mr. Somers testified as follows:

> Q All right. What happened as you were driving down Old Fort Road?
>
> A We were driving down. I was just kind of teasing him a little bit. You know, he had a nice truck previously, and I was just teasing him about having to drive his mom's truck again, kind of like being back in high school. He just looked at me and kind of grinned, squatted back in the seat and shoved the accelerator to the floor.
>
> Q What happened to his truck?
>
> A He was in an accident Christmas eve.
>
> Q And was the vehicle damaged?
>
> A Yeah, he ran into a pole.
>
> Q And what happened after he accelerated? What's your next memory?
>
> A I had my phone. It was on the dash. And he was on the accelerator, and I had leaned down. I was picking my phone up off the floor. I remember looking through the steering wheel and seeing the speedometer at 140 kilometres an hour, and being a mechanic, I'm used to them governing out at, like, 160, 170, so I asked him, you know, if that was all the truck had. He replied yes.
>
> Q And what's your next memory after that?
>
> A He made a -- like, a roar noise, I guess, like something startled him, and the truck just swung really hard.
>
> [Emphasis added]

[239] Teasing Mr. MacLellan about having to drive his mother's truck at his age was not encouragement to drive faster. On the other hand, the comment "is that all it

has?" might arguably amount to goading him on. But even if that were so, Mr. MacLellan's reply was "yes" and there is no evidence that the Ford went any faster after Mr. Somers made his comment.

[240] As there is no factual basis for either joint participation or encouragement submissions, it is unnecessary to address the question of whether the defendants have expressly raised them in their pleading.

I. Apportionment

[241] The defence of contributory negligence succeeds only with respect to Mr. Somers' failure to wear a seatbelt.

[242] The relative blameworthiness approach to apportionment is well-established. In *Aberdeen v. Langley Township*, 2007 BCSC 993, Justice Groves set out a number of factors that may be of assistance in making the assessment:

> [62] Thus, fault is to be determined by assessing the nature and extent of the departure from the standard of care of each of the parties. Relevant factors that courts have considered in assessing relative degrees of fault were summarized by the Alberta Court of Appeal in *Heller v. Martens*, *supra*, at ¶ 34 as follows:
>
> > 1. The nature of the duty owed by the tortfeasor to the injured person…
> >
> > 2. The number of acts of fault or negligence committed by a person at fault…
> >
> > 3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault…
> >
> > 4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy… Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis…
> >
> > 5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy…
> >
> > [Authorities omitted.]
>
> See also *Vigoren v. Nystuen, supra*, at ¶ 90 (summarizing these same factors).

> [63] Many of the above-noted factors are discussed in Chiefetz, *Apportionment of Fault in Tort, supra*, at pp. 102-104. Considering that, I conclude it would be appropriate to add the following as relevant factors:
>
> 6. the gravity of the risk created;
>
> 7. the extent of the opportunity to avoid or prevent the accident or the damage;
>
> 8. whether the conduct in question was deliberate, or unusual or unexpected; and
>
> 9. the knowledge one person had or should have had of the conduct of another person at fault.
>
> …
>
> [65] However, the fact that the fault results from an active versus a passive act of a party should not impact on the assessment of the degree of relative fault. …
>
> [66] Another important factor in assessing the relative degree of blameworthiness of the parties is the magnitude of the departure from the standard of care. …
>
> [67] Thus, the key inquiry in assessing comparative blameworthiness is the relative degree by which each of the parties departed from the standard of care to be expected in all of the circumstances. This inquiry is informed by numerous factors, including the nature of the departure from that standard of care, its magnitude, and the gravity of the risk thereby created.

[243] The defendants submit that Mr. Somers should be found 25–30% liable based on his failure to wear his seatbelt.

[244] The plaintiff submits that the Court is without the means to determine the degree of Mr. MacLellan's departure from the standard of care because denied driving. He argues that Mr. MacLellan should not be permitted to benefit from his lack of candour and that no more than a ten percent apportionment should be made to Mr. Somers.

[245] Mr. Somers testified that he considered the accident risk minimal because they were driving on a back road. I do not consider that a reasonable risk assessment. The Road is not a pokey dirt road. It is paved with relatively few intersecting roads and, in the photographs shown of the Accident area, resembles a smaller highway. The drive was about 15 minutes long. Further, although I have

concluded that Mr. MacLellan was not noticeably impaired, Mr. Somers was aware that Mr. MacLellan had been drinking.

[246] As noted by the plaintiff, as Mr. MacLellan denied being the driver there is no evidence explaining why control of the Ford was lost. I am satisfied that it is appropriate in the circumstances to assume the Accident was the result of a departure from the standard of care. there is no evidence as to what speed a prudent driver would have been driving at the point in the Road where the Accident took place. Nonetheless, I am persuaded that the speed was excessive in the circumstances. However, Mr. Somers did not describe Mr. MacLellan as otherwise driving recklessly before the Accident (e.g., hot-dogging, in the wrong lane). Rather, he described Mr. MacLellan as having been startled.

[247] Considering those facts and the factors outlined in *Aberdeen*, I conclude that liability should be apportioned 75% to the defendants and 25% to Mr. Somers.

VI. DAMAGES

[248] As a number of members of the Somers family appear in this part of the decision, I will identify them and thereafter refer to them by their first names. This is for clarity and no disrespect is intended.

[249] The plaintiff seeks non-pecuniary damages, damages for past and future capacity loss, an award for the cost of future care, special damages, and an in-trust award for his mother and brother. He seeks to have the issues of tax gross-up and management fees determined after damages have been quantified.

A. Overview of Awards Sought

[250] The plaintiff seeks the following amounts under the following heads:

Non-Pecuniary Damages	$439,000.00
Past Loss of Earning Capacity	$500,000.00

Future Loss of Earning Capacity	$6,800,000.00
Cost of Future Care	$ Not Totalled
In-Trust Claims (Both)	$105,000.00
HCCRA Claim	$132,107.92

[251] The defendants submit that the following amounts are appropriate:

Non-Pecuniary Damages	$400,000.00
Failure to Mitigate (applied against Non-Pecuniary)	(25%)
Past Loss of Earning Capacity	$259,373-$311,083
Future Loss of Earning Capacity	$2,362,662.96
Cost of Future Care	$2,000,000 - $2,250,000
In-Trust Claim	$15,000.00
HCCRA Claim	$132,107.92

B. Pre-Accident: Interests, Status and Plans

[252] By all accounts, Mr. Somers was an able-bodied and adventurous person prior to the Accident. He was highly focussed on outdoor activities such as dirt-biking, snowmobiling, and like pursuits. Not surprisingly given those interests, he occasionally suffered physical injuries.

[253] At the time of the Accident he had no ongoing issues from past physical injuries and no history of mental issues. The defendants do not say that the plaintiff had any pre-existing injury or conditions relevant to his claim.

[254] As already noted, after working elsewhere briefly, the plaintiff started at Daski. He added skills there, eventually obtaining his Class 1 and Crane Operator tickets. Having worked his way from labourer up to running a truck crew/picker, the plaintiff was earning $40 an hour when he left Daski in November 2017.

[255] His employer at Daski, David Kowalski, testified. He described the plaintiff as a hard worker and always willing to work overtime. He observed that some of Daski's clients would name request the plaintiff for their work.

[256] The plaintiff left Daski to take a lower paying position at Ditmarsia, where he could apprentice as a heavy duty mechanic. He was interested in working as a heavy duty mechanic, to the extent that he had looked into apprenticing earlier, back before he left New Brunswick for Fort St. John. However, his move to Ditmarsia was also very significantly motivated by his desire to have a job where he would spend more of his work time in Fort St. John and less time travelling and out at project sites.

[257] The plaintiff enrolled in the Industrial Training Authority's heavy duty mechanic program ("Program"). It is necessary to successfully complete the full Program in order to be certified as a journeyman heavy duty mechanic. There are four educational components to the Program, all of which must be completed to attain journeyman status, along with a minimum of 6000 apprenticeship work experience hours.

[258] The plaintiff completed the first education component by attending classes in Alberta in January and February 2018. He successfully completed that component. He had no difficulty performing his apprenticeship work duties at Ditmarsia.

[259] In 2018, the plaintiff earned $84,300 in employment income from Ditmarsia and some additional income as employment insurance benefits (relating to a brief layoff and to attending Program classes in Alberta.) From January 1, 2019, through to the Accident, he earned $38,600 in employment income from Ditmarsia.

[260] The plaintiff testified that he intended to complete the Program in four years, which is the least amount of time it can be done in. At the time of the Accident, the plaintiff had not taken any steps or made any plans to enrol in the Program's second education component. He testified that he delayed making plans to enrol as Ditmarsia was very busy. He had accumulated 3,943 apprenticeship hours. His number of hours reflects, in part, the fact that he was working significant overtime hours for Ditmarsia and the fact that he did not take off to attend the second educational component.

[261] He testified that as soon as he had journeyman status under the Program, he intended to further obtain a Red Seal certification ("Red Seal"). A Red Seal is an advanced qualification that entitles the holder's journeyman status in one province or territory to be recognized in other Canadian jurisdictions.

[262] The plaintiff testified that after he obtained his Red Seal, he had planned to start working in the Alberta oil and gas patch (the "Patch" or the "Wood Buffalo-Cold Lake Region"). The Patch pays, by a significant margin, the highest trade wage rates in Canada.

[263] The plaintiff also testified that he had a plan to purchase and outfit his own service truck and work as a heavy duty mechanical service contractor. He agreed on cross-examination that he had no savings set aside for purchasing or equipping a service truck.

[264] He also testified that he very much enjoyed time with his nieces and nephews and had always anticipated having a partner and children in the future.

C. Post-Accident Recovery Period

[265] The facts set out in this section were essentially undisputed. Any issues will be addressed as they arise in the telling.

1. Overview

[266] As above, after initial treatment at FSJH, the plaintiff was air-lifted to VGH. He was sedated and intubated at FSJH for the transfer. At VGH, he underwent lengthy surgeries and then spent about four weeks in acute care. After that, he was admitted to GF Strong.

[267] The plaintiff's mother, Corina, came out from Miramichi to see and assist him while he was at VGH and GF Strong. His brother, Joey, also came out from Miramichi to visit and assist for a few weeks.

[268] On April 26, 2019, about two weeks after arriving at GF Strong, the plaintiff was transferred back to VGH due to an infection. The infection necessitated a further serious surgery. He stayed at VGH after surgery until May 6, 2019, at which point he was transferred again to GF Strong.

[269] The plaintiff developed a swelling in his left leg in June 2019. Testing conducted as a result of the swelling revealed a pulmonary embolism. The embolism was effectively treated with blood thinners. In early July 2019, continued testing to investigate the swelling revealed a heterotopic ossification ("HO") in the plaintiff's left hip. HO is a condition in which bone forms in soft tissue where bone does not belong. The plaintiff was given IV treatment for the HO. He was discharged from GF Strong on July 13, 2019.

[270] On discharge, the plaintiff went up to Fort St. John for a few weeks to organize his return to Miramichi. On July 24, 2019, while in Fort St. John, he and Mr. Mitchell went to dinner together and had drinks. The plaintiff drank multiple double highball drinks. The outing resulted in the plaintiff feeling unwell and having to be taken to the FSJH emergency department. At FSJH, he was found to have a BAC of 0.19.

[271] The plaintiff obtained a truck with hand controls so he could drive. He and his father drove from Fort St. John to Miramichi with the plaintiff's belongings. They

arrived in Miramichi at the end of August and moved the plaintiff into his parents' house. He continued to live there as of trial.

[272] In or about early 2020, the plaintiff began a romantic relationship with Katie Williston. Ms. Williston lives in Miramichi. By the time of trial, they were in a committed relationship. The plaintiff and Ms. Williston both testified that they are hoping to establish a family home and have at least one child together.

1. Medical Developments

[273] The plaintiff's HO did not respond to the IV treatment he had been given and continued to grow. In May 2020, it was recommended that it be surgically removed. That surgery was delayed, both by a pre-existing waitlist and the impacts of the pandemic, allowing the HO to continue to progress.

[274] By June 2021, the HO was causing pain in the plaintiff's left hip and increasing his SCI-related lower back pain. Due to the location of the HO, the plaintiff's ability to move his left leg was increasingly restricted. It became difficult to sit properly in his wheelchair or use his leg braces.

[275] The HO was removed at VGH in June 2022 and the surgery was followed by a lengthy rehabilitation period at GF Strong.

[276] The plaintiff testified that the HO surgery lessened but did not eliminate his hip and back pain. It did greatly improve his left hip and leg range of motion. After the HO surgery, however, his left leg began to stiffen up and shake in spasm. It is unclear whether the spasms relate to the HO and/or the HO surgery or merely an SCI-related development.

[277] The plaintiff testified that his leg will spasm if, for example, his wheelchair encounters a significant bump. In reaction, his leg will attempt to straighten and he will need to grip the sides of his wheelchair to stay seated. It also generally spasms when he transfers to and from bed or tries to sit up in bed. He described this as "his leg fighting" his efforts to direct his body. Stretching will calm the spasm down, but it

is then likely to recur again a few hours later. Taking the drug Baclofen can help reduce the spasms.

[278] Ms. Williston spends much of every day with the plaintiff. She testified that she generally sees him dealing with leg spasms about five to six times each day and also in bed at night. She said it occurs more or less often during the day depending on what activities he engaged in that day.

[279] The plaintiff's central SCI occurred at the T11-T12 vertebrae. He has limited nerve sensation below that level. He has some feeling in his lower stomach and, as of trial, the tops of his thighs. When lying on his back, he can flex his hip enough to lift his left knee, but he cannot bring it back down again. If his leg is squeezed, he can tell where the leg is at and estimate where on the leg the squeeze took place. He frequently experiences "electric shock" sensations in his toes.

[280] The plaintiff suffers sexual dysfunction as a result of his SCI. He recently identified a medical treatment that will enable him to have an erection, but he does not have ability to orgasm.

[281] The plaintiff gave evidence regarding his lower back pain as of trial (i.e., post-HO surgery). He described it as being constant at a lower level, but as significantly aggravated by certain movements or by spending prolonged periods in the same position. He was able to spend three days in the courtroom giving evidence while seated in his wheelchair, albeit with court hours and court breaks. Ms. Williston testified that in her observation most of the plaintiff's pain issues relate to his lower back, and that his back pain is especially notable when they drive farther than simply point to point within Miramichi.

[282] The plaintiff suffers neck pain and headaches regularly, and was reporting increasing frequency in this respect in the months prior to trial. He also reports poor and disrupted sleep and general fatigue.

[283] The plaintiff has neurogenic bowel and bladder issues. He describes these as the symptoms that have the most practical impact on him in terms of his ability to

engage in activities, or interact with people, outside his residence. He declines to go places due to fecal incontinence, which is both extremely embarrassing to him and a practical challenge to deal with out of the home. He testified that he has been unable to establish a reliable bowel and bladder routine (a “bowel protocol”) and has been to a New Brunswick hospital on an emergency basis for bowel and bladder related issues on multiple occasions. He has tried different medications and treatments. He has had limited success with a recent combination of PEG powder and Senokot, but continues to swing between the extremes of uncomfortable constipation and incontinence.

[284] The plaintiff testified that over the last 18 months or so the frequency of his fecal incidents has varied. It might happen a couple of the weeks in a given month, there might be a period with few or no incidents, but then it might be four times in a single week. The plaintiff did experience improvements in this respect during his most recent period at GF Strong. Ms. Williston described him as being “closer” to establishing a bowel protocol while he was GF Strong.

[285] There is some dispute in the evidence as to how often these fecal incidents are currently happening. Ms. Williston’s numbers are lower, but it appears that the plaintiff is reluctant to report all fecal incidents to her. I am satisfied they remain unpredictable in terms of pattern and remain, at least some months, quite frequent.

[286] The plaintiff uses an intermittent catheter to empty his bladder. He testified that he uses five to six sterile catheters each day. He says that he is generally able to deal with his bladder effectively when his bowel situation is under control, but that when his bowel routine is particularly dysfunctional there are corresponding bladder issues, including urinary tract infections.

[287] The plaintiff says he has ongoing difficulty with his memory. He says this most commonly manifests as his being inexplicably unable to recall something he should know as second nature, such as how to tie his shoelaces or a basic mechanical principle. He says he sometimes “zones out” in the middle of doing something and then cannot account for that period of time.

[288] He testified that he has concentration issues, especially when there is noise. He says, for example, that holiday dinners with extended family are difficult because with the presence of children, multiple conversations at the table and the various other things going on, he cannot focus sufficiently to engage in conversation. He becomes frustrated and removes himself from the group setting.

[289] He testified that due to his memory and concentration issues he finds it difficult to absorb information that is new to him.

[290] The plaintiff not infrequently thinks that he should just end his life and has, at times, made plans to that end. He has had no counselling to date, but does talk to Ms. Williston about his feelings. He testified that he would like to try counselling and is open to trying some anti-depressant medications.

[291] The plaintiff has a set of leg braces (or “KAFO”s). These braces go on over his clothing and lock his legs straight. When he is braced, he can stand and use forearm crutches to get around. As he needs to maintain four points of contact with the ground, the use of his hands is very limited while uses bracing. He cannot bend or lean over, and can only pick up very light things with his fingers (e.g., a bottle of water).

[292] He used braces frequently until the progression of his HO began to interfere. As his HO got worse, he began to use them only exceptionally, such as to enable him to get to and from a plane seat. Now that he has had the HO surgery, he is hoping to resume using braces as much as possible.

2. Treatments

[293] The plaintiff testified that when he returned to New Brunswick he attended a chiropractor in August 2019 for a few sessions, and had some physiotherapy sessions. The physiotherapy sessions were helpful in expanding his range of motion.

[294] The plaintiff testified that medical professionals are in short supply in New Brunswick in general and in Miramichi in particular.

[295] He saw a physiatrist in Fredericton, Dr. El-Sherbini, several times in late 2020 through 2021, initially going with complaints about pain. Dr. El-Sherbini prescribed him an anti-depressant medication and also recommended some drugs or supplements for his bowel issues. The plaintiff found the prescribed anti-depressant medication ineffective. He agreed that Dr. El-Sherbini told him it was common to have to try several kinds to find an anti-depressant that works, but that he did not seek to try another when the one prescribed did not help.

[296] The plaintiff was eventually able to get a family doctor in Miramichi, but still finds it difficult to get an appointment.

[297] The plaintiff has an upcoming appointment with a pain care specialist. He would like to see a bowel specialist, but has found it hard to arrange. He testified that the waiting lists for the bowel specialists are long and that he has yet to get close enough to the front of the line to be given a set appointment date to wait upon.

[298] The plaintiff saw an occupational therapist, Whitney Price, several times during the winter of 2020. He testified that he found working with Ms. Price to organize his health-related affairs to be very helpful as she knew what was needed, where things were available, and who to put him into contact with for services. For example, Ms. Price put him into contact with a business willing to do wheelchair repair and part replacement and through which he was able to order a manual handcycle. Ms. Price also helped him with his Canadian Pension Plan disability benefit forms.

[299] The plaintiff said he would have continued to work with Ms. Price, but for the fact that she went on maternity leave. He tried to find a replacement occupational therapist after she went on leave, but found it difficult as there are very few in the Miramichi area.

3. Living Arrangements

[300] The plaintiff's parents' house is a bungalow with a main floor and basement. His parents had a ramp to the door built for him. No modifications were done to the bathroom. The plaintiff is able, with some manoeuvring, to transfer to the toilet and shower bench by himself.

[301] Because the laundry is in the basement, he has no access. Corina does his laundry, including when he has a fecal incident. Corina also helps clean the plaintiff and his wheelchair after fecal incidents.

[302] The plaintiff can cook smaller, lighter meals such as a sandwich or soup, but cannot manage anything much larger without assistance. The work of putting things in and taking things out of the oven is done by Corina. He is able to use a barbeque to cook provided it is set at an appropriate height.

4. Activities

[303] The plaintiff has a manual wheelchair and his hand-controlled truck. He hopes to return to using his leg braces frequently now that he has had his HO surgery. The plaintiff has an ATV 350 Honda that he uses to ride on the trails around his parents' house and enjoys that. He uses a manual hand cycle he has and sometimes uses a hoverboard. The latter three of these enable he and Ms. Williston to go outside and engage in activities together without his wheelchair.

[304] Joey build a customized shop table for the plaintiff that enables the plaintiff to do work on it while seated. He built the plaintiff's table alongside his own work table, and he and plaintiff sometimes work on dirt bike engines together for fun.

[305] The plaintiff does occasionally visit the homes of friends and family, and he sometimes goes for dinner at Ms. Williston's parents' house, but he testified that he is reluctant to leave his parents' house very much or for very long due to his concern that a fecal incident might occur.

2. Scope of Dispute regarding Injuries

[306] As would be expected on these facts, there are a significant number of injuries and limitations that are not disputed.

[307] The defendants concede that the plaintiff suffered a SCI resulting in paraplegia and neurogenic bowel and bladder. They take the position, however, that the plaintiff can and should establish a bowel protocol. They submit that establishing a bowel protocol would significantly improve his bowel and bladder issues and that that improvement would, in turn, significantly lessen his psychiatric symptoms.

[308] The defendants concede that the plaintiff has chronic pain. They argue, however, that his chronic pain levels were significantly improved by his June 2022 HO surgery and may improve further yet as recovery from that surgery continues. Again, they submit that any improvement in his chronic pain levels will result in a lessening of his psychiatric symptoms.

[309] As just foreshadowed, the defendants also concede that the plaintiff has developed psychiatric conditions as a consequence of the Accident. They assert that these can be measurably improved with treatment, his reduction in chronic pain, and by him establishing a bowel protocol.

[310] The defendants agree that the plaintiff suffered a TBI in the Accident. They argue that it was a mild, rather than moderate, TBI and deny that the plaintiff sustained any diffuse axonal injury.

[311] The defendants also concede that the plaintiff is presently suffering cognitive impairment. They dispute the severity of that impairment, and they further submit that it is primarily due to his psychiatric symptoms and thus will improve when his psychiatric symptoms lessen.

[312] The parties reached a mid-trial agreement regarding the plaintiff's reduced life expectancy. A British Columbia male with the plaintiff's birth date would have a normal life expectancy of 49.1 additional years as of October 3, 2022

(commencement of trial). The parties agree that for the purposes of damages that number should be assumed to be reduced by 6 years (i.e., 43.1 additional years from commencement of the trial).

D. The Medical Evidence

[313] The plaintiff's medical experts relied on the plaintiff's self-reporting, their direct observations and their review of medical records. The defendants' medical experts did the same. Non-medical experts – e.g., Mr. Richards and Ms. Moss – also reviewed medical records in preparing their reports.

[314] While the plaintiff testified about his medical conditions and treatment at considerable length, few of the medical records listed by the medical experts as having been reviewed for their reports were entered into evidence. The defendants take issue with the plaintiff's medical reports on this basis and urge the Court to carefully consider whether there is admissible evidence establishing the various facts and assumptions set out in the plaintiff's medical reports. This was a generic submission. The defendants did not catalogue the facts and assumptions they were challenging on this basis.

[315] In advancing their objection, the defendants rely upon *Garneau v. Izatt-Sill*, 2013 BCSC 46 [*Garneau*]. There, a forensic pathologist gave opinion evidence aimed at establishing which of two ejected occupants had been ejected from the driver seat based on the injuries sustained. The plaintiff was one of the ejected occupants, the other had died in the accident.

[316] In *Garneau*, there appears to have been no direct evidence before the court regarding the plaintiff's injuries. Notably, *Garneau* was a trial on liability alone. The plaintiff testified, but his testimony focussed on commuting habits, not his injuries (para. 41). The pathologist had no first hand information (para. 95) and none of the documents she had relied upon had been entered into evidence or made subject to a notice to admit: at paras. 96–97.

[317] Justice Weatherill disregarded the pathologist's report:

> [116] … Regrettably, through no fault of Dr. Rice, I am unable to give any weight to her opinions in this regard because she relied on documents that were not introduced in evidence, in particular autopsy and hospital records. These documents could easily have been proven by way of a document agreement or a Notice to Admit. If a fact fundamental to an expert's opinion is not proven, the opinion cannot be relied on.

[318] By comparison, in this case the plaintiff spoke with his medical experts and testified at length about the same matters he self-reported about to the experts, including his symptoms and treatments following the Accident. All of the plaintiff's medical experts – and all the defendants' but for Dr. Friesen – personally assessed the plaintiff and made direct observations. Some number of the plaintiff's more significant medical records were entered into evidence at trial. (For that matter, Mr. MacLellan also testified, and his March 23, 2019, FSJH records were entered into evidence.) Further, as demonstrated by the significant concessions outlined above – with the exception of the severity of the plaintiff's TBI, the disputed medical issues here are primarily questions of prognosis, not diagnosis.

[319] Accordingly, this case is not comparable to *Garneau*. That said, I concur that the record could have been greatly improved by entering medical records relied upon by the medical experts by agreement or by a notice to admit. I agree with the defendants that the Court is obliged to be mindful of the fact that that was not done when giving weight to the expert reports.

[320] In my view, there is a more significant problem with the expert reports, including all of the medical expert reports. It is this. The plaintiff developed HO within months of the Accident. As it progressed, it became an increasingly central factor in the plaintiff's level of chronic pain and functional limitations. All of the document reviews and personal assessments made by the health care experts (including the occupational therapists) were done prior to the plaintiff's HO surgery in June 2022. The basic level of success of the HO surgery was known by trial and the plaintiff testified about the improvements. However, the plaintiff's physiatry expert testified that the full effects of the surgery could not be assessed until a date six months post-surgery (i.e., December 2022).

[321] Further, while the plaintiff was at GF Strong following his HO surgery, he was able to make some progress toward establishing a bowel protocol.

[322] This is particularly significant, given that there is general agreement among the medical experts that the plaintiff's level of chronic pain is significant to his prognoses, and that successfully establishing a bowel protocol would improve not only the plaintiff's psychiatric symptoms, but his potential to socialize and engage in constructive activities.

1. Traumatic Brain Injury (TBI)

[323] The dispute as to whether the plaintiff sustained lasting diffuse axonal injury was addressed in terms of whether his TBI is properly categorized as mild or moderate. Some background information is required to form the expert opinions as they relate to the TBI issue.

[324] TBI is typically defined as damage to the brain arising from an external mechanical force. The categories of severity are mild, moderate and severe.

[325] One of the possible reference points for determining the severity of a TBI is the Glasgow Coma Scale ("GCS"). The GCS assesses eye, verbal and motor capabilities as indicators of level of consciousness on a scale of 3 to 15. GCS scores range from 3 (completely unresponsive) to 15 (fully responsive). GCS scores generally relate to TBI severity as follows: 13 to 15 is mild; 9 to 12 is moderate; and 3 to 8 is severe.

[326] Mild TBI is defined as a traumatically induced physiological disruption in brain function manifested by at least one of the following: loss of consciousness for less than 30 minutes; loss of memory for events immediately before or after the accident for a total period of less than 6 hours; a recorded GCS between 13 and 15; the presence of a focal neurologic sign. Moderate TBI is defined as a disruption manifested by at least one of the following: loss of consciousness for more than 30 minutes but less than 24 hours; a period of post-traumatic amnesia of to 7 days duration; a recorded GCS between 9 and 12.

[327] The plaintiff was a given an initial GCS of 15 by the paramedics at the Accident scene, and scores of 14, 12 and 9 (in that order) at FSJH.

[328] The following facts, which are undisputed, are relevant to the differing expert opinions:

a) the plaintiff's BAC was 0.16;

b) the plaintiff was sedated, intubated and put on a ventilator prior to being air-lifted; and

c) the plaintiff's emergency and acute care treatment following the Accident involved analgesics and multiple lengthy surgeries.

2. Plaintiff's Medical Expert Evidence

a) Anton Report

[329] Dr. Hubert Anton, a physiatrist, assessed the plaintiff on January 19, 2022, and produced a report on the same day ("Anton Report").

[330] He diagnosed the following injuries and symptoms as resulting from the Accident:

a) Multiple thoracic fractures to the T11, T12 and (to a lesser extent) T9 vertebrae.

b) An SCI at the T11 level resulting in paraplegia below that level, with no movement in the legs and weakness in the abdominal and trunk muscles and spasticity characterized by increased tone or tightness in the extremities and involuntary movements.

c) Chronic pain from his SCI, both nociceptic (arising from an injury or pathology triggering pain sensors) and neuropathic (arising from injury or pathology to a nerve itself). The most significant pain area is the back, with that pain being

nociceptive (spinal fractures, surgery and mechanical loading) and neuropathic (residual effects of the SCI).

d) Neck pain at the level of a healed fracture, probably myofascial (regional soft tissue pain syndrome).

e) Neurogenic bowel, neurogenic bladder, and associated risk of related medical complications (e.g., abdominal pain, rectal prolapse, bladder infections).

f) Sexual dysfunction impacting erection, orgasm and fertility.

g) A TBI, likely mild, but possibly moderate.

h) Pulmonary embolus (lung), successfully treated with blood thinners.

i) HO in the left hip area, significantly restricting hip flexion and likely contributing to increased mechanical back pain.

j) Probable major depressive disorder (MDD).

k) Complaints of cognitive symptoms, possibly in part due to residual TBI impacts but probably also other factors including pain, fatigue due to disordered sleep, and depression. Neuropsychological testing recommended to determine nature and severity.

[331] Dr. Anton identified the plaintiff as at risk for SCI complications that could impact long-term prognosis, including:

a) An almost 5% chance of developing a clinically significant posttraumatic syringomyelia (a cyst in the spinal cord) causing pain, loss of sensation and loss of motor function;

b) Degenerative changes above and below his surgical fusion line with possible increased pain and spasticity;

c) Increased risk for metabolic syndrome (coronary artery disease and related disorders);

d) Osteoporosis;

e) Accelerated decline due to aging, including a more than 50 percent chance of requiring assistance (or increased assistance) with activities of daily living after age 55.

[332] In his opinion, these and other related factors make it likely that the plaintiff will have a decline in functioning resulting in decreased independence between the ages of 55 and 60.

[333] Dr. Anton agreed that successful HO surgery could be expected to improve the plaintiff's symptoms and mobility and that some of his symptoms would likely show corresponding improvement if a bowel protocol was successfully established. He agreed that the plaintiff's GF Strong records from his HO surgery rehabilitation period indicated improved bowel and bladder issues.

[334] Dr. Anton agreed on cross-examination that alcohol consumption may have had an impact on the plaintiff's GCS scores.

b) Lu Reports

[335] Dr. Shaohua Lu, a psychiatrist, assessed the plaintiff on May 24, 2022, and produced a report dated June 13, 2022, and a subsequent response report ("Lu Reports").

[336] Dr. Lu diagnosed the plaintiff with MDD and Somatic Symptom Disorder (SSD), both severe, with the two diagnoses being "mutually aggravating and exacerbating."

[337] The patient history portion of the first Lu Report includes the following:

> Mr. Somers knows that he is depressed. He has avoided antidepressants because they don't seem to help. He also had avoided counselling. He is scared to talk about what happened and he worries that talking about his

> injuries will make his anxiety worse. He also feels that unless counselling can fix his spine, what is the point in talking. He tries to focus on keeping safe on a day-to-day basis. He is more open to counselling now because he has been struggling for so long. Similarly, he is open to medications because it has been so difficult to control all his symptoms.
>
> [Emphasis added.]

[338] With regard to MDD, Dr. Lu states:

> Mr. Somers is deeply pessimistic toward the future, though much of his health anxiety is based on realistic concerns. He has the psychological apprehension associated with chronic disability. His psychological symptoms are further reinforced by the permanence of his spinal injury and the associated physical restrictions and secondary losses. His lack of personal freedom, due to his mobility limitations and incontinence, is a perpetuating factor for his psychiatric symptoms. Mr. Somers has yet to adopt to his new physical reality, both physically and emotionally.
>
> …
>
> … He continues to have both physical and mental symptoms. The direct and secondary impacts of his spinal cord injury, including his occupational disability and the loss of his physical activities, are the key factors in the worsening of his mood.

[339] As to SDD, Dr. Lu opines that the plaintiff meets the DSM-5 criteria, with his preoccupation being pain and his physical limitations. He notes that the plaintiff obsessively ruminates on his physical limitations and that "his physical disability is a perpetuating factor for his major depression [MDD] and SSD." In Dr. Lu's opinion, the plaintiff is also at high risk of developing agoraphobia and needs ongoing psychological support to overcome his fear and avoidance.

[340] Dr. Lu diagnosed a moderate TBI, but recommended a full TBI assessment and neuropsychological testing to identify areas of deficit. Dr. Lu's view that the TBI was moderate centres on the plaintiff having had a GCS score of 12 prior to intubation and the plaintiff displaying typical and characteristic functional impairments associated with a moderate brain injury. He indicates that the possibility of full recovery from a moderate TBI is reduced by co-morbid conditions (SCI, MDD, and SDD), concludes that little improvement is to be expected given the time since the Accident.

[341] On cross-examination, Dr. Lu agreed it was possible that the plaintiff had already been sedated for intubation at the time of his 12 GCS score. He agreed that if that was so, then his TBI could be mild or mildly complex.

[342] Dr. Lu testified that the plaintiff's MDD and SDD impair attention and concentration, and his SCI, chronic pain and chronic bowel issues cause him to be constantly focussed on his physical condition. In his view, the plaintiff will – entirely aside from any TBI effects – be cognitively impaired by these psychiatric issues. In Dr. Lu's view, even with an optimal treatment response, the plaintiff will suffer fluctuating medical and psychiatric symptoms indefinitely and require long-term psychological monitoring. He also observed that the plaintiff is at risk of further deterioration in his psychiatric symptoms in the event of any further physical deterioration.

[343] He agreed, however, that the psychiatric symptoms interfering with cognition would likely improve along with corresponding improvements in chronic pain levels and bowel issues.

c) Cohen Report

[344] Dr. Douglas Cohen, a neuropsychologist, assessed the plaintiff over a two-day period in January 2022, and produced a report on June 16, 2022 ("Cohen Report"). He was qualified as a registered psychologist with specialized training in neuropsychology and psycho-diagnostics assessments.

[345] The defendants requested that Dr. Cohen be produced for cross-examination. Unfortunately, he was unable to testify, either at trial or at any time in the reasonably near future, due to a family emergency. By agreement of the parties the Cohen Report was entered into evidence notwithstanding his non-attendance.

[346] Dr. Cohen opines that the plaintiff meets the DSM-5 diagnostic criteria for Mild Neurocognitive Disorder (MNCD) based upon "a modest decrement in cognitive performance which does not interfere with most normal activities of daily living." In his view, the plaintiff's MNCD is due to a mild or moderate TBI and other contributing

factors (i.e., chronic pain, constant poor sleep and fatigue, noise and light intolerances, depression and anxiety).

[347] As to psychological functioning, Dr. Cohen concluded that the plaintiff had MDD “with Anxious Distress” and possibly a separate generalized anxiety disorder. Dr. Cohen did not conclude that the plaintiff presently had SSD, but that he was at risk of developing it.

[348] In Dr. Cohen’s view, the plaintiff’s cognitive deficits and low frustration tolerance render clerical and organizational work unpromising and that the plaintiff would struggle with any retraining that is complex or requires sustained focus.

3. Defendants’ Medical Expert Evidence

a) Purtzki Report

[349] Dr. Jacqueline Purtzki, a physiatrist, assessed the plaintiff on May 13, 2022, and provided a report dated July 13, 2022 (“Purtzki Report”).

[350] On many points, Dr. Purtzki’s opinion is consistent with that of Dr. Anton (as is reflected in the scope of the defendants’ concessions).

[351] In her view, the plaintiff likely suffered a mild or moderate TBI. She states that this is not a case where severity should be determined by reference to GCS scores alone. In her view, the complicating considerations include the plaintiff’s BAC, the uncertainty regarding the duration of his loss of consciousness, and the multiple factors (e.g., medication, pain) that may have contributed to post-traumatic amnesia.

[352] Dr. Purtzki opines that it is extremely difficult to say whether the plaintiff’s reported deficits are due to axonal injury, or to chronic pain, poor sleep, and severe depression and anxiety, or to a combination thereof. She considers the plaintiff’s chronic pain and emotional issues to be the primary contributors to his cognitive impairment. She recommended an MRI and a detailed neurological assessment.

[353] Dr. Purtzki affirmed the plaintiff’s HO diagnosis. She described HO as a “dreaded complication of SCI” and as a condition that can be very disabling, difficult

to treat, and that has a propensity to recur. She finds that the plaintiff suffers spasticity in his lower extremities as well as spasms.

[354] She notes that the plaintiff reported severe low back pain. In her opinion, this pain is primarily myofascial pain and thus came on as he lost hip motion due to the progression of the HO. In her opinion, this severe low back pain seriously disrupted his sleep and thereby worsened many of his other symptoms.

[355] With regard to developing a bowel protocol, she concludes that his attempted treatments to date have been insufficient. She recommends he work with a community nurse to establish a bowel protocol.

[356] She agrees that the plaintiff suffers from severe depression, some suicidal ideation, severe anxiety and fear of being in pain. She states that he has not accepted his disability, needs grief counselling, and will likely require repeated counselling sessions through his life.

[357] In Dr. Purtzki's opinion, the plaintiff may be capable of retraining for a fairly routine sedentary job, but says it is "unclear what this would be like." She says that part-time employment or volunteering are his most realistic options, and that the primary value of pursuing these would be social and emotional benefit as opposed to financial gain.

b) Riar Report

[358] Dr. Kulwant Riar, a psychiatrist, assessed the plaintiff on April 20, 2022, and produced a report dated July 13, 2022 ("Riar Report"). His opinion is significantly consistent with that of Dr. Lu.

[359] He concludes the plaintiff has SSD with pain as a prominent feature and of at least moderate intensity. He indicates that anxiety and depression are aggravating and perpetuating the SSD. He also diagnoses the plaintiff with either MDD or an adjustment disorder with depressed mood and suicidal thoughts, in either case at a level of moderate to severe intensity. In his trial testimony, he leaned toward severe.

[360] Dr. Riar concludes the plaintiff most likely suffered a mild TBI and that it is unlikely that the plaintiff suffers any long-term cognitive sequelae from the TBI. In his view, the plaintiff's cognitive issues are due to his psychiatric symptoms, and his cognition would improve if his psychiatric symptoms were lessened.

[361] He describes that possibility of improvement in his psychiatric symptoms as guarded but possible:

> As far as psychiatric prognosis for the next six months, it is guarded, but with the abovementioned interventions, his functioning can be improved and the course of his illness can be changed. Although the life-changing deficits will be there for the rest of his life and would cause frustration and stress from time to time, it is likely that his intense psychiatric symptoms will settle eventually. I cannot say when. Once the acute phase of anxiety, depression and social anxiety are under control, he will have a better ability to deal with his disappointments, restrictions and other fallout from the accident better than he is doing at the present moment.

[362] He recommends "somewhat urgent" psychiatric care and treatment with psychotropic medications and cognitive behavioural therapy (CBT) to address his depression and anxiety. He further recommends that the plaintiff, at the same time, begin seeing a psychologist or counsellor for 14-16 counselling sessions. He refers to this recommended number of counselling sessions as being "to start with", with counselling be extended if needed.

c) Friesen Report

[363] Dr. Ingrid Friesen, a neuropsychologist, provided a report dated August 18, 2022 ("Friesen Report"). The Friesen Report is a rebuttal to the Cohen Report. Dr. Friesen did not assess the plaintiff. Her report critiques Dr. Cohen's testing, scoring, compilation of test results, and conclusions regarding the degree of the plaintiff's functional impairment. She also offers her own opinion regarding his degree of impairment based on what she regards as the corrected test results.

[364] The plaintiff did not request to have Dr. Friesen produced for cross-examination.

[365] Dr. Friesen identified a number of scoring errors and expressed a concern about coaching in respect of one test. She offered the following observations (as summarized in the defendants' closing):

> a. "Dr. Cohen appeared to fail to consider that Mr. Somers' level of consciousness and memory for events likely was negatively impacted by his consumption of alcohol prior to the accident and that he was intubated shortly after the accident, with the latter procedure requiring sedation. Given that both alcohol and sedation reduced Mr. Somers' level of consciousness, it was not appropriate to use Glasgow Coma Scores nor length of post traumatic amnesia to determine severity of brain injury." (page 8)
>
> b. "Given that psychological test results were invalid, as discussed in detail above, it was not appropriate for Dr. Cohen to have made the diagnoses of Major Depressive Disorder or Generalized Anxiety Disorder based on his data." (page 8)
>
> c. "With regard to psychological treatment, Dr. Cohen recommended 12 to 15 hours of Cognitive Behavioural Therapy..., as well as an additional 40 to 48 hours of supportive treatment. First, the recommendation of 52 to 63 sessions is highly unusual and excessive, with standard recommendations being approximately 12 sessions. I note that Dr. Riar, Psychiatrist, recommended 14 to 16 sessions. Second, supportive therapy has not been shown to be useful in reducing symptomatology for depression or anxiety, as the optimal gains are found with Cognitive Behavioural Therapy only. It also would have been prudent for Dr. Cohen to have made the recommendation for Mr. Somers to discuss with his primary care physician about whether or not antidepressant medication may be of benefit for him." (page 9)
>
> d. "As indicated above, Mr. Somers' test performance indicated him to have low scores on aspects of attention, problem solving, and perseveration on some tests, but not others. Test scores on measures of processing speed, language, memory, sustained attention were entirely within normal limits. From a cognitive perspective, there do not appear to be any significant barriers with regard to participation in retraining or work... Mr. Somers' level of non-verbal intelligence suggests he would be able to complete a college or undergraduate degree, thereby providing numerous options for finding success in occupations that would accommodate his physical needs." (page 9)
>
> e. "Dr. Cohen opined that Mr. Somers would be expected to have difficulties with activities of daily living as a result of cognitive deficits... Again, test results do not support this assertion given that the vast majority of scores across cognitive domains were entirely within normal limits." (page 10)
>
> f. "In conclusion, as a result of cherry-picking select test results, Dr. Cohen makes broad generalizations of expected impairments of Mr. Somers' functioning in daily life, as well as with his vocational and recreational pursuits. The test data, however, suggests mild difficulties in specific aspects of cognitive functioning that would not be expected to cause serious disruption in functioning." (page 10)

[366] In addition to Dr. Friesen's criticisms, the defendants object to the Cohen Report on the basis that it does not indicate the extent to which Dr. Cohen is relying on his own observations and/or facts from other sources.

E. Injury Findings

[367] I will address first the Cohen and Friesen Reports.

[368] When the parties prepared for trial, both counsel did so expecting that Dr. Cohen would attend and be called upon to defend his findings on cross-examination and to respond to Dr. Friesen's criticisms. When Dr. Cohen was unexpectedly unable to attend, counsel acted commendably in coming to an agreement aimed at allowing the trial to proceed. Notwithstanding the good intentions behind that agreement, the ultimate result was to leave the Court without any means to meaningfully assess the reliability of the Cohen or Friesen Reports.

[369] I am persuaded that Dr. Friesen has raised some points that should be addressed. Had Dr. Cohen testified, he may well have persuasively addressed them. As it stands, however, the points have been raised and left unanswered. In the circumstances, I decline to rely on the Cohen Report with respect to the nature and degree of the plaintiff's cognitive impairment, prognosis for improvement or the appropriate treatment for same.

[370] To the extent the Cohen Report offers psychiatric diagnoses and prognoses, I would reject these. His opinion is not consistent with those of Dr. Lu and Dr. Riar, both of whom are highly qualified psychiatrists and both of whom testified persuasively regarding their diagnoses. I prefer the evidence of Dr. Lu and Dr. Riar with respect to psychiatric diagnoses (and would do so even if there were no Friesen Report).

[371] While I have concluded that Dr. Friesen has raised points that need to be addressed in order to enable me to place any weight on the neuropsychology and psycho-diagnostics assessments aspects of the Cohen Report, that does not amount to a finding that her critique and adjusted results are correct. To the

contrary, the issues raised by Dr. got to the core of their shared area of expertise. I am not in a position to resolve the dispute for myself based solely on the Friesen Report. I conclude that the end result is that I must disregard the opinions, and the diagnoses in particular, set out in both the Cohen and Friesen Reports.

[372] The end result is that there is no reliable neuropsychological expert evidence before me with respect to the nature or degree of the plaintiff's cognitive impairment. (Notably, that is so notwithstanding that other experts have expressly stated that neuropsychological testing was either required or of key importance to assessing the plaintiff's cognitive dysfunction.)

[373] Both Dr. Anton and Dr. Lu opined that the TBI was either mild or moderate. Both conceded on cross-examination that the GCS scores they relied to conclude that it could be considered moderate may have been affected by external factors. I am satisfied that the plaintiff's current cognitive dysfunction can be readily accounted for by other factors without any axonal injury. On the whole, I find that the plaintiff has failed to establish on the balance of probabilities that he did suffer a moderate TBI or that he is impaired due to lasting axonal injury, and thus has not discharged his burden to prove that injury.

[374] Accordingly, the question of whether the plaintiff's current level of cognitive function is likely to improve is dependent on the prognoses with respect to his MDD and SSD psychiatric symptoms and other contributing factors (e.g., sleep dysfunction). These prognoses are dependent on variables that include his chronic pain levels, his ability to successfully establish a bowel protocol and the fact that his chronic pain may, in fact, be worsened with age and the various risks identified by Dr. Anton and Dr. Purtzki, including the recurrence of HO.

[375] The HO surgery did significantly improve the plaintiff's hip and lower back pain. However, I accept Dr. Anton's evidence that the plaintiff's back pain is nociceptive and neuropathic and will continue. This corresponds with the plaintiff's testimony that his back pain is improved, but that he continues to have chronic

constant low-level pain that is aggravated by extended sitting time and certain activities. The plaintiff continues to have chronic back pain after the HO surgery.

[376] The plaintiff testified that he continues to have some hip pain following the HO surgery and has now developed leg spasms. He also suffers myofascial neck pain, some occasional headaches and shock sensations in his toes. Further, the leg spasms are a new source of sleep disruption.

[377] I am satisfied that these ongoing symptoms will perpetuate his MDD and SDD symptoms. Further, his level of chronic pain may increase in the future given the risks identified by Dr. Anton and Dr. Purtzki's evidence that HO itself is likely to recur.

[378] I accept Dr. Lu's opinion that the plaintiff's SSD and MDD are not focussed solely on pain, but also on his physical limitations. While it is possible to be better assisted and better accommodated, paraplegia is, absent dramatic medical developments, permanent. The evidence establishes that as he ages the plaintiff's limitations will only increase.

[379] The plaintiff's bowel improvement while in rehabilitation at GF Strong after his HO surgery does suggest that he could likely improve his present bowel issues by working with a community nurse and might be able to establish a bowel protocol. However, the evidence goes no further than that.

[380] Thus, I conclude that the plaintiff's SSD, MDD and fatigue will continue to impact his cognitive functioning for the foreseeable future. I reject Dr. Riar's optimistic prognosis for meaningful improvement in cognitive functioning.

[381] However, I am also satisfied that his level of impairment is mild and that he can continue to do activities of daily living, engage in things he already knows (such as basic mechanics) and learn new things provided they are not complex and he is not required to do so in circumstances that amplify his distraction (e.g., time pressures, pain, fear of fecal incidents. His primary cognitive issue relates to his ability to focus and thus to learn and retain complex new information.

I. Non-Pecuniary Damages

[382] A non-exhaustive outline of factors to be considered when assessing non-pecuniary damages was set by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. The listed factors include: the plaintiff's age; the nature of the injury; the 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 stoicism (as a factor which generally ought not to penalize a plaintiff).

[383] In *McCliggot v. Elliott*, 2022 BCCA 315, Justice Dickson (for the majority) stated:

> [43] The purpose of non-pecuniary damages is to provide solace and to make life more endurable for an injured plaintiff. To the extent possible, non-pecuniary damages are intended to compensate the plaintiff for pain and suffering caused by their injuries and the consequences of those injuries, direct and indirect, including the loss of amenities and enjoyment of life: *Moskaleva* at para. 95; *Boyd v. Harris*, 2004 BCCA 146 at para. 29. That said, it has long been recognized that "there is no medium of exchange for happiness" and putting a money value on pain and suffering is impossible: *Dilello v. Montgomery,* 2005 BCCA 56 at para. 31. It has also been recognized that "[t]he monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one": *Dilello* at para. 32, citing *Andrews v. Grand & Toy Alberta Ltd*., 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229.
>
> [44] As Justice Dickson (as he then was) explained in *Lindal v. Lindal*, 1981 CanLII 35 (SCC), [1981] 2 S.C.R. 629, the amount of an award for non-pecuniary damages is determined by a functional approach that does not depend exclusively on the gravity of the injury. Rather, it depends additionally on the ability of the award "to ameliorate the condition of the victim considering his or her particular situation". It follows that the need for solace does not necessarily correlate with the seriousness of an injury. When assessing non-pecuniary damages, the role of the trier of fact is to gain a full appreciation of the plaintiff's overall loss and determine an amount of compensation appropriate to the circumstances of that particular plaintiff: *Lindal* at 637.

[384] The rough upper limit was first established in a trilogy of Supreme Court of Canada cases that included *Andrews v. Grand & Toy Alberta Ltd.*, [1978] S.C.R. 229, 1978 CanLII 1. Under the trilogy, the upper limit was set at $100,000. That sum has been adjusted over time to account for inflation.

[385] The defendants concede that Mr. Somers suffered a catastrophic loss. His injuries are grave and his life will differ markedly from anything he had expected. The point of dispute is the determination of the upper limit.

[386] The defendants seek $400,000, the amount identified as the rough upper limit in the September 15, 2022, decision in *Alvarado v. KCP Heavy Industries Co. Ltd*., 2022 BCSC 1621 at para. 14 [*Alvarado*]. There, Justice Tammen wrote:

> [14] The rough upper limit for non-pecuniary damages was set long ago in a suite of cases, including *Andrews v Grand & Toy Alberta Ltd*. 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229 [*Andrews*], which came to be known at the "Trilogy". At that time, the upper limit was $100,000.00. That figure has been adjusted over time to account for inflation. In BC, I am satisfied, based on comparatively recent decisions from judges of this Court, that the upper limit is now approximately $400,000.00.

[387] The plaintiff submits that the amount awarded in *Alvarado* warrants further updating. He seeks $439,000, a present value amount calculated by Mr. Benning using the Consumer Price Index (CPI). Rather, they rely on the fact that Alvarado is itself a fairly recent decision and the number is a "rough" upper limit, the implication being that it need not be slavishly undated for each individual trial.

[388] The amount sought by the plaintiff is in keeping with *Gustafson v MacFarlane*, 2022 BCSC 1872, where the parties agreed upon, but Justice Gomery was content to award, $435,000 as the upper limit. In *Gustafson,* the trial began in September 2022, where this trial began in October 2022.

[389] It will not always be the case that the plaintiff will provide expert evidence providing a case specific date calculation, but the plaintiff did so here. The defendants did not take issue with the accuracy of Mr. Benning's calculation. I am satisfied that **$439,000** is appropriate here. The plaintiff should not be undercompensated in the interest of simplicity when a precise figure has been entered into evidence. That is particular so in these highly inflationary times.

II. Failure to Mitigate

[390] A two-step test applies where a defendant asserts that the plaintiff failed to mitigate their losses: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57; *Haug v. Funk*, 2023 BCCA 110 at paras. 56–61.

[391] The defendant must establish:

a) the plaintiff acted unreasonably in eschewing recommended treatment; and

b) the extent (if any) to which damages would have been reduced had the plaintiff acted reasonably.

[392] The defendants argue that the plaintiff failed to seek treatment for his psychiatric injuries and that the expert evidence shows that doing so would have positively impacted his overall condition and quality of life. Specifically, they say it was unreasonable to only try one anti-depressant given that Dr. El-Sherbini had specifically advised that patients generally need to try multiple anti-depressants before finding one that is suitable and effective.

[393] This argument is rejected on multiple basis.

[394] First, I am not satisfied that an effective anti-depressant would have meaningfully improved the plaintiff's SSD symptoms. Further, during the same period the defendants assert he should have been on anti-depressants, the progressing HO was increasing the plaintiff's chronic pain levels and also increasing his physical limitations (e.g., his ability to use braces). It is difficult to see how his SSD could have remitted during the period in question, even if his depression was lessened. There is no evidence that improving only the plaintiff's MDD would have made any significant difference to his psychiatric state. The defendants have not established a failure to mitigate.

[395] Second, even if the plaintiff had discovered an anti-depressant capable of improving his MDD and his SDD (and for that matter, even his associated cognitive impairments), the plaintiff's other injuries from the Accident would still warrant an

award at the rough upper limit. He would still have severe and catastrophic injuries, chronic pain and drastically reduced expectations for the remainder of his life.

[396] The Court is not to attempt to draw fine distinctions between different types of severe injuries. Devastating injuries will qualify for the maximum award available notwithstanding that even more severe cases receive the same amount. In *Blackstock v. Patterson*, [1982] 4 W.W.R. 519, 1982 CanLII 435 (B.C.C.A.), the Court of Appeal stated at paras. 11–12:

> Firstly, it was not suggested in Lindal that the injuries suffered by the plaintiffs in the trilogy cases were identical: see judgment of Dickson J. in Lindal at pp. 283-84:
>
> > No one would suggest that the injuries suffered by these two individuals were precisely identical. The court recognized that their situations were in many ways quite different. Notwithstanding these differences, the court awarded the same sum for non-pecuniary loss. Equally, the fact that Brian Lindal's injuries are different from and arguably more severe than those of James Andrews does not justify an award of more than $100,000 in this case.
>
> Once it was determined that the plaintiffs suffered severe personal injuries the court concluded as a matter of policy that the limit for non-pecuniary damages should be fixed at $100,000. This conclusion was not based on the view that the awards made by the lower courts in the trilogy cases were excessive or that there was no distinction between the cases, but was based on the premise that in the case of all "severely injured plaintiffs", in order to avoid extravagant claims, an upper limit of $100,000 should be imposed. It follows, that even if the respondent's injuries could be said to be different from or not quite as severe as those suffered by the plaintiffs in the trilogy cases, her injuries were found by the trial judge to be "devastating", and, therefore, fell within the $100,000 category fixed in Lindal and the trilogy cases.

[397] There may be cases where the threshold for an award at the upper limit is just barely crossed by a plaintiff on the facts. Whether mitigation can or should reduce an upper limit award in that situation is not a question that need be addressed. This is not such a case. The plaintiff has crossed the threshold with ample room to spare. A reduction for mitigation in these circumstances would result in undercompensation.

III. Loss of Earning Capacity

A. Legal Framework

[398] Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for his injury: *Rowe v. Bobell Express Ltd*., 2005 BCCA 141 at para. 30 [*Rowe*]; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[399] Past loss of earning capacity need not be established on a balance of probabilities, since what would have happened between the Accident and the trial is essentially hypothetical, as is the case with predictions regarding future loss: *Smith v. Knudsen*, 2004 BCCA 613 at para. 29.

[400] A hypothetical possibility should be taken into consideration so long as it is a real and substantial possibility, and not mere speculation: *Athey v. Leonati*¸ [1996] 3 S.C.R. 458 at para. 27, 1996 CanLII 183; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

[401] With respect to past loss of earning capacity, as explained in *Rowe*, a claim can be measured in various ways:

> [31] Evidence of this value may take many forms. As was said by Kenneth D. Cooper-Stephenson in *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 205-06,
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> > … The essence of the task under this head of damages is to award compensation for any pecuniary loss which will result from an inability to work. “Loss of the value of work” is the substance of the claim – loss of the value of any work the plaintiff would have done but for the accident but now will be unable to do. The loss framed in this way may be measured in different ways. Sometimes it will be measured by reference to the actual earnings the plaintiff would have received; sometimes by a replacement cost evaluation of tasks which the plaintiff will now be unable to perform; sometimes by an assessment of reduced company profits; and sometimes by the amount of secondary income lost, such as shared family income.
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> [Emphasis omitted.]

[402] With respect to loss of future earning capacity, the Court of Appeal has three recent decisions addressing the proper approach: *Dornan v. Silva*, 2021 BCCA 228

[*Dornan*]; *Rab v. Prescott*, 2021 BCCA 345 [*Rab*]; and *Lo v. Vos*, 2021 BCCA 421 [*Vos*].

[403] In *Dornan* at para. 156, Justice Grauer cites with approval from *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32, as follows:

> An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened…

[404] At para. 47 of *Rab*, the Court of Appeal outlined a three-stage framework for assessing loss of future earning capacity:

> a) Stage 1: Does the evidence disclose a potential future event that could lead to a loss of capacity? At this stage, the trial judge considers whether the plaintiff may suffer from ongoing symptoms which could influence their ability to earn income.
>
> b) Stage 2: Does the evidence demonstrate that there is a real and substantial possibility that this potential loss of capacity will cause pecuniary loss?
>
> c) Stage 3: Having established the real and substantial likelihood of pecuniary loss stemming from the plaintiff's loss of capacity, the trial judge must assess the loss. At this stage, the trial judge should determine the relative likelihood of the future loss occurring and whether any contingencies apply. The award should be reduced to account for the relative likelihood that the future event will not occur.

[405] The parties acknowledge that the analysis effectively begins at the third step on the facts of this case. The evidence plainly establishes a real and substantial possibility that the plaintiff will not continue in his employment and will suffer pecuniary loss. The question is how to quantify that loss.

[406] In *McKee v. Hicks*, 2023 BCCA 109 [*McKee*], the Court of Appeal commented on the available approaches and methods. As the facts in the *McKee* case have parallels to those here, I reproduce the Court's comments at some length:

> [77] As the judge noted, there are two approaches to quantifying a loss of future earning capacity, namely the earnings approach and the capital asset approach. Both are intended to result in a fair estimate of the loss: *Perren v. Lalari*, 2010 BCCA 140 at para. 32; *Grewal v. Naumann*, 2017 BCCA 158 at

> para. 48 (Justice Goepel dissenting but not on this point). The earnings approach advanced by Mr. McKee is typically used in cases where there is an identifiable loss of income, for example, where the plaintiff has an established work history. The capital asset approach employed by the judge is typically used when that is not the case and the court makes an award for the plaintiff's loss of opportunity: *Kringhaug v. Men*, 2022 BCCA 186 at para. 43.
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> …
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> [80] Having appropriately settled on the capital asset approach for assessing Mr. McKee's loss of future earning capacity, there were a number of methods open to the judge to assess that loss. In *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.), this Court identified three acceptable methods for doing so:
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> > 43 The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income.

B. Factual Findings

[407] The factual issues that need to determined in order to determine and apply the appropriate analysis include the following:

a) But for the Accident, would the plaintiff have attained journeyman status and a Red Seal certification;

b) But for the Accident, where would the plaintiff have spent his working life (e.g., Fort St. John, the Patch, New Brunswick)?

c) With the Accident, will the plaintiff be capable of remunerative employment in the future?

[408] I intend to proceed by making some foundational factual findings and then considering the labour economist expert evidence before me in light of those findings.

[409] The first issue then is what the plaintiff's career path would have looked like but for the Accident. For the reasons already outlined with respect to the plaintiff's credibility, his testimony about his career plans warrants close scrutiny.

[410] The plaintiff called a number of former employers and colleagues to testify regarding his past work ethic and future career plans. I note that these witnesses were also close personal friends (and, in Mr. Durelle's case, the plaintiff's brother-in-law).

[411] David Kowalski owns and operates Daski. He said the plaintiff started as a labourer and progressed over time to running a crew truck and operating a picker. He described the plaintiff as reliable and hard-working and someone who never turned down overtime. The plaintiff was occasionally name-requested by Daski clients.

[412] Jackson Dore was a colleague at Ditmarsia. Mr. Dore is a journeyman heavy duty mechanic and, in 2015, obtained his Red Seal. The plaintiff worked as Mr. Dore's apprentice. Mr. Dore described the plaintiff as a good worker who was willing to work long hours and overtime.

[413] Aiden Harris joined Ditmarsia in 2018. He was also an apprentice heavy duty mechanic and he and the plaintiff often worked side by side. Mr. Harris described the plaintiff as very hard working and said it was not unusual for them to work 12 to 18 hours a day, and up to 20 hours on occasion. Mr. Harris attained his journeyman status and now works for ATI Canada, a company that provides heavy duty mechanic services at mining projects near Fort McMurray, Alberta. He got a Red Seal certification in March 2022 in order to qualify for his current position in Alberta.

[414] Mr. Durelle and the plaintiff worked together for a time at Daski. Mr. Durelle is a "first level heavy duty mechanic", which means he progressed to the same point in the Program the plaintiff was at when the Accident occurred. Mr. Durelle chose not to pursue apprenticeship in the Program beyond the first educational component.

[415] When Daski laid employees off during the COVID-19 work slowdowns, Mr. Daski took a used service truck in lieu of cash severance. For the past 18 months, he has been operating the service truck as an independent contractor. He testified that he has had no difficulty obtaining work doing heavy equipment repair, including welding and fabricating. He often works at project sites located two to three hours drive from Fort St. John, but charges for his driving time. For 2022, Mr. Durelle testified that he had taken 2 months off and still made $160,000 to $170,000 to the date of the trial. Mr. Durelle testified that he would like to get two or three more service trucks as he believes there is growth opportunity to expand and that he has a good reputation.

[416] Mr. Mitchell is currently working as a water operator at Petronas Energy in the fracking industry. He testified that the charge out rate Petronas pays for service trucks to repair pipeline and fracking equipment is $120 to $180 per hour.

[417] Mr. Comeau and the plaintiff worked together at Daski for three to four years. Mr. Comeau described the plaintiff as always willing to help out and willing to work extra hours. At some point after the Accident, Mr. Comeau returned to working and residing full-time in New Brunswick.

[418] Some of these witnesses, and Mr. Durelle in particular, testified that the plaintiff had at some point in time indicated that he wanted to obtain his journeyman status quickly.

[419] I accept the evidence of these witnesses that the plaintiff was a hard and reliable worker during his period of employment in Fort St. John. However, their evidence touching upon the plaintiff's career plans was, unlike their evidence about his work ethic, vague and conclusory. Mr. Durelle's evidence is a fair example of that. None of their testimony persuaded me that the plaintiff had any true settled career plan or schedule.

[420] The plaintiff did not come to Fort St. John on a quest to become a journeyman mechanic. He came because his friends persuaded him there was big

money to be made there. He spent years working as a labourer and operator at Daski. Significantly, even when he left Daski to join Ditmarsia, it was as much (if not more) because he disliked travel and project site work as much as it was in order to apprentice. He wanted employment that would enable him to spend time in Fort St. John.

[421] That said, I accept that the plaintiff had a genuine interest in mechanics. He had looked into apprenticeship back when he was still living in New Brunswick and his aptitude for it is reflected in his vocational testing results. That does not, however, translate into a commitment to obtaining journeyman status, let alone a Red Seal.

[422] For the years 2018-2022, less than 50% of those who registered for an ITA apprenticeship (all trades) received a certificate of qualification as a journeyman within six years of registering. Mr. Durelle's career path illustrates that there is real value to be obtained by apprenticing well short of attaining journeyman status.

[423] Contrary to the plaintiff's claim that he intended to complete the Program as quickly as possible, he had made no plans to enrol in the second educational component as of the time of the Accident. He was instead capitalizing on the significant overtime available at Ditmarsia and was content to do so indefinitely.

[424] On the evidence, I cannot conclude that the plaintiff was any more likely to complete the Program and attain journeyman status than not.

[425] I am not persuaded that the idea of the plaintiff owing and operating his own service truck is anything more than speculation. He had not set aside money for that purpose. There is no evidence of his having any particular entrepreneurial inclinations. Finally, as Mr. Durelle's testified, operating a service truck entails spending hours traveling to project sites and time at project sites. Those are the same job characteristics that led the plaintiff to leave Daski.

[426] For similar reasons, I find the suggestion the plaintiff might have gone to work in the Patch to be no more than speculation. The plaintiff's own vocational expert

testified that the reason wages are high in the Patch is because the work location and working conditions are undesirable. Again, the plaintiff is an individual who left a higher paying job at Daski in order to avoid travel and project site work.

[427] The plaintiff asserts that the amount of overtime he worked at Ditmarsia is indicative of the type of overtime he would work throughout the span of his career. I do not agree.

[428] The plaintiff did work a lot of overtime, both at Daski and Ditmarsia. That reflects the fact that he came out to Fort St. John to capitalize on the high earning available due to the wage rates and ample overtime. He was a single person in his twenties and the point of coming out to Fort St. John was to work. He was maximizing his earnings at a particular time, place and point in his life. I do not accept that the amount of overtime he was working at Ditmarsia immediately prior to the Accident is evidence of a lifelong propensity to work comparable hours. To the contrary, I find it far more likely that these would be atypical in retrospect and would likely represent a high water mark in his lifetime.

[429] I also agree with the defendants that the evidence does not establish that the plaintiff had any settled intention to remain in Fort St. John (or even, for that matter, in British Columbia or Alberta) for the rest of his working life. He might have stayed, but he might equally as well gone back to New Brunswick or elsewhere.

[430] I turn to the evidence regarding the plaintiff's potential "with Accident" career path.

[431] The plaintiff's high school performance, work history, and vocational test results all indicate that the plaintiff's decision to pursue skilled trade work was playing to his strong suit. The plaintiff took an extra year to finish high school and his only strong grades were in shop classes. The defendants' vocational expert, Ms. Samantha Gallagher, noted that many of his vocational test results were considerably below what she would expect from someone who had graduated from high school.

[432] The plaintiff had little scholastic aptitude before the Accident. I have concluded that post-Accident he will most likely continue to suffer some cognitive impairment and that it is a form of impairment that impacts his ability to learn anything new and complex or to learn in pressured or distracting circumstances.

[433] An educational program would be required in order for the plaintiff to attempt financial, professional or non-trade technical work. I find it to be very unlikely that the plaintiff could retrain for and enter the various sedentary occupations identified by the vocations experts as those commonly engaged in by paraplegic adults who return to work.

[434] I note that the defendants' raised objections to the opinion provided by Mr. John Lawless, the plaintiff's vocational expert, in relation to the plaintiff's employability. As I am not relying on Mr. Lawless' opinion in reaching my conclusion, I will not address those objections.

[435] Realistically, the plaintiff remains capable of self-employment on a part-time basis which would enable him to structure his work schedule that is built around his health and wellness issues. In short, to accommodate himself in a way that it is improbable any other employer would agree to. As noted by Ms. Gallagher, he might be able to do this in the area of small engine repair or something similar. The defendants submit that this renders it appropriate to impute part-time income at minimum wage to the plaintiff.

[436] I do not agree. There is no evidence about what would need to be invested to start up a business of this kind or, even more importantly, whether operating such a business in Miramichi would be feasible as a for-profit endeavour and merely enable the plaintiff to have a useful and interesting way to fill some of time. There is no evidence before me that could enable me to conclude that the possibility that he might prove capable of running such a "shop" could reasonably be analogized to profitable to part-time employment.

[437] On the evidence, I conclude that the possibility of the plaintiff having remunerative employment in the future is too speculative to warrant any deduction, even as a contingency.

C. Assessing Loss of Capacity

[438] Darren Benning, a labour economist, provided an expert report with respect to the plaintiff's loss of earning capacity, past and future. Mr. Benning's opinion is based on a set of assumptions he was instructed to make. Those assumptions include the following:

a) absent the Accident, the plaintiff would have continued working as a heavy duty mechanic with Ditmarsia or a similar employer through to retirement;

b) the plaintiff would have obtained his journeyman certificate as a heavy duty mechanic by January 2022;

c) effective January 2022, his wage rate would have increased to the $65.00 per hour wage paid in the Wood Buffalo-Cold Lake Region (the Patch rate);

d) The plaintiff would have worked regular hours and the same amount of overtime hours he had worked during his 16-month period with Ditmarsia;

e) The plaintiff would have worked full-time right through to retirement; and

f) The plaintiff would have retired at age 70.

[439] Based on those assumptions, Mr. Benning did calculations under the earnings approach to calculate an identifiable loss of income.

[440] The factual findings I made above support only one of the assumptions used by Mr. Benning in calculating the plaintiff's past and future loss of earning capacity, and only in part. I accept that for purposes of past loss, the plaintiff would likely have continued to worked overtime at or close to the same rate he did during his pre-Accident employment with Ditmarsia during the period that he continued to work

(i.e., he would work less if he did take time off work to attend educational components under the Program).

[441] In any event, the findings of fact made above satisfy me that the earning approach is not appropriate here. Many of the observations made by the Court of Appeal in *McKee* are equally applicable here:

> [78] In this case, Mr. McKee was only 19 years old at the time of trial. He was on his chosen career path and had successfully completed the first year of his apprenticeship without missing any work due to his injury. But the judge did not accept that, absent Dr. Hicks' negligence, it was a "near certainty" he would have followed this path. ... In such circumstances, this Court has held that "courts should generally undertake the capital asset approach": *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 17.
>
> [79] Accordingly, the judge did not err in rejecting the earnings approach and adopting the capital asset approach. While the judge found there was a risk of complications in the future that might result in Mr. McKee requiring accommodations or a change in employment, the evidence did not support the calculation he advanced. That calculation was based on the difference in earnings between (1) Mr. McKee becoming and working to retirement as an industrial electrician absent Dr. Hicks' negligence and (2) Mr. McKee working to retirement as a retail clerk, graphic designer or photographer due to Dr. Hicks' negligence. However, this calculation would have been an inappropriate way to assess Mr. McKee's loss of future earning capacity given his young age, his successful completion of the first year of his apprenticeship and the fact that it was not a "near certainty" that he would have become an industrial electrician absent Dr. Hicks' negligence.
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> [Emphasis added.]

[442] Here, while Mr. Somers was not 19 but rather 29 years old, he had only recently enrolled in the Program and had only progressed to the first level. It was far from certain that he would ever complete the Program. Thus, the capital asset approach is appropriate here.

Future Loss of Earning Capacity

[443] The plaintiff's labour economist, Hua (Judy) Ren, provided an expert report dated August 18, 2022. By agreement of the parties, her report was augmented by a supplementary set of calculations accounting for the mid-trial agreement reached with respect to life expectancy.

[444] Ms. Ren's approach is based on Census-reported earnings for all British Columbia males working as heavy duty equipment mechanics (NOC 7312). She provided earnings for two groups: (1) heavy duty equipment mechanics working with or without journeyman certificates; and (2) heavy duty equipment mechanics working with journeyman certificates. In addition to projections based on average earnings, she also provided income projections for the same two groups based on the earnings at the top quartile.

[445] I am persuaded that Ms. Ren's approach is appropriate in these circumstances. I have found the plaintiff was no more likely than not to complete the Program and attain journeyman status. Using the average earnings in the "with and without journeyman certificate" category appropriately accounts for this very considerable contingency. Using average annual earnings also averages out the various levels of overtime worked by different heavy duty mechanics. Further, although I rejected the plaintiff's argument that his Ditmarsia overtime establishes a overtime baseline that would continue throughout his working life, I accept that the evidence is that plaintiff proved a hard working and reliable employee throughout his time in Fort St. John. That finding can be taken into account in the calculation by using the top income quartile average within the "with and without journeyman certificate" category. Looking at Ms. Ren's supplemental calculations, this results in a statistical average annual income of $127,912 (plus non-wage benefits).

[446] While his counsel argued that the evidence demonstrates that the plaintiff has a marked individual attachment to the workforce, I do not agree. There is no evidentiary basis to support directing Mr. Benning to assume that the plaintiff would always have worked full-time through to retirement or that he would retire at age 70. Certainly his working considerable overtime while in Fort St. John does not establish that. To the contrary, many people work extra hours or work hard during their younger years for the express purpose of taking time off later or being able to retire early.

[447] The Census data cited by Ms. Ren indicates that many Canadian males working as heavy duty mechanics do work less than full-time, especially after the age of 60. Further, they show that the average retirement age for a heavy duty mechanic is about 62, which is significantly lower than the average for all Canadian males. Ms. Ren's calculations include an adjustment for part-time contingencies. I agree with her that the statistics indicate that this adjustment is appropriate. (I note her observation that the application of a labour force withdrawal contingency for BC males with apprenticeship or trades certificates or diplomas to the plaintiff's assumed retirement age of 70 is equivalent to assuming certain retirement at age 62.2.)

[448] With respect to reduced life expectancy, both Mr. Benning and Ms. Ren address the impact on future earning capacity by deducting a percentage of lost years earnings from without-Accident income. Mr. Benning used a 50 percent deduction, while Ms. Ren used 70 percent. As no persuasive argument was advanced in favour of either, I will use 60 percent. The end result is a future loss of earning capacity award of **$2,782,000.**

Past Loss of Earning Opportunity

[449] Using the same approach and categories (all education, third quartile), and accepting that the plaintiff's with-Accident net income amounted to $7,283 in EI disability benefits, Ms. Ren calculates a past loss of earning capacity award of $311,083.

[450] In my view, that number should be adjusted to account for the fact that the plaintiff worked an atypical amount of overtime in the two years or so immediately preceding the Accident. It is reasonable to assume that he would likely have continued at or near that rate up to the date of trial, although he would have earned less had he actually taken time off to attend the Program's education components.

[451] From January 1, 2019, through to the day of the Accident, the plaintiff had earned $38,600 in employment income from Ditmarsia. If continued at that rate, it would have resulted in annual earnings of about $155,000. Ms. Ren's calculations

are based on a statistical average annual income of $127,912. In the circumstances, I find it appropriate to add an additional $100,000 to Ms. Ren's total in order to account for the possibility of continued atypical overtime. (As already noted above, for purposes of future earning capacity, an approach that uses average total earnings accounts for average overtime earnings, as I have concluded the plaintiff's pre-Accident overtime pattern will very likely prove atypical in the long run.)

[452] The plaintiff is awarded **$411,083** as damages for past loss of earning capacity.

IV. Cost of Future Care

A. Legal Framework

[453] The plaintiff emphasizes that "full compensation" is intended: *Andrews v. Grand & Toy Alberta Ltd*., [1978] 2 S.C.R. 229 at paras. 23–26, 1978 CanLII 1; S.M. Waddams, *The Law of Damages*, 8th ed., (Toronto: Thomson Reuters, 2022) at 3:10. The plaintiff also cites *Milina v. Bartsch*, [1985] B.C.W.L.D. 692 at para. 184, 1985 CanLII 179 (S.C), (per McLachlin J., as she then was) with respect to the appropriate standard for future care:

> The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary to promote the mental and physical health of the plaintiff.

[454] A recent and helpful summary of the applicable principles in assessing cost of future care damages is found in *Gill v. Borutski*, 2021 BCSC 554. There, Justice Gomery wrote:

> [107] The purpose of an award for the cost of future care is, so far as is possible with a monetary award, to restore the plaintiff to the position she would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff; *Gignac v. Insurance Corporation of British Columbia,* 2012 BCCA 351 [*Gignac*] at paras. 29–30, citing *Milina v. Bartsch* (1985), 1985 CanLII 179 (BC SC), 49 B.C.L.R. (2d) 33 (S.C.) and *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.
>
> [108] Each part of the claim must be supported by the medical evidence. If the plaintiff relies on the report of an occupational therapist or rehabilitation

> consultant, there must be an evidentiary link between the medical evidence and the recommendations in the report; *Gignac*, at paras. 31–32. If the plaintiff has not used or sought out a service in the past, it will usually be difficult for her to justify a claim in respect of that service; *Warick v. Diwell*, 2018 BCCA 53 at para. 55.
>
> [109] At the end of the day, an award for the cost of future care is assessed, not mathematically calculated; *Uhrovic v. Masjhuri*, 2008 BCCA 462 at paras. 28–31.

[455] A claim for cost of future care must be medically justified, and must be reasonable to both parties: *Quigley v. Cymbalisty*, 2021 BCCA 33 at paras. 43–44.

B. Expert Reports

[456] The plaintiff relies on the evidence of Jacquelyn Abdel-Barr, an occupational therapist and life care planner. Ms. Abdel-Barr assessed the plaintiff and produced a functional capacity evaluation and cost of future care report on July 8, 2022, as well as a response report dated August 11, 2022 ("Abdel-Barr Reports").

[457] The defendants rely on the evidence of Mr. Jeff Padvaiskas, an occupational therapist. Mr. Padvaiskas conducted an assessment of the plaintiff on May 16, 2022, and produced a functional capacity evaluation and cost of future care report dated July 8, 2022 ("Padvaiskas Report").

[458] The plaintiff argues that the Padvaiskas Report should be given little weight as compared to the Abdel-Barr Reports because Mr. Padvaiskas: (1) is not certified as a life care planner; (2) has no rehabilitation hospital work experience; (3) did not do an in-home assessment; and (4) did not review any of the medical opinion reports.

[459] I agree with the defendants that the fact that Ms. Abdel-Barr is a certified life care planner does not automatically mean that her opinion is entitled to more weight. I endorse the comments expressed in *Warick v. Diwell*, 2017 BCSC 68:

> [246] Dealing with the evidence of Mr. Worthington-White, I would not find that it is automatically entitled to less weight than Ms. Baptiste's solely because of her additional designations in life care planning. If there is additional rigour and expertise involved in preparing a life care plan beyond what an experienced occupational therapist is capable of offering, I think that

> is something that will reveal itself in the evidence of each specific case, rather than being assumed at the outset by virtue of the credentials themselves...

[460] Nor, in the circumstances, can it be asserted that Ms. Abdel-Barr's report deserves more weight because she did an in-home assessment. That is because both experts performed whatever assessments they did do prior to the plaintiff's HO surgery. These reports are weakened in the same manner already outlined with respect to the expert medical evidence. Similarly, while it might be significant in other circumstances that Ms. Abdel-Barr reviewed the expert reports and Mr. Padvaiskas did not, that distinction is also tempered by the fact that the medical reports themselves are based on assessments that pre-date the HO surgery.

[461] On the other hand, I do consider the fact that Ms. Abdel-Barr has considerable experience dealing with the rehabilitation and future care needs of persons with SCI injuries to be significant. The first Abdel-Barr Report also reveals a depth of research and costing rigour surpassing that found in the Padvaiskas Report. For these reasons, I will use the Abdel-Barr Report as an initial reference point in addressing the disputed cost of future care issues.

[462] The defendants argue that the Abdel-Barr Report is generally excessive and significantly inflated. They note that Ms. Abdel-Barr provided calculations for medical recommendations even where they were unlikely to be pursued or likely to be discontinued and that her costing includes recommendations that were listed as alternatives to other listed items. The defendants also object that the Abdel-Barr Reports include costs that the plaintiff would have incurred in any event of the Accident, such as a gym membership and a mattress.

[463] Ms. Abdel-Barr has costed out duplicative recommendations and her report does include some treatments that the plaintiff has now already had and drugs that have already been tried and proven unsuccessful. Her report expressly flags the former and indicates that where alternative care was recommended by different medical experts she has costed each recommendation rather than take it upon herself to choose one. The result is a report that can be used to select and mix and

match recommendations in light of the Court's findings, which is helpful. With regard to the latter, it is true that some of the recommendation had been overtaken by the time of trial. For example, the plaintiff had already had a sleep consultation and had already had the benefit of a GF Strong inpatient rehabilitative program after his HO surgery. Ms. Abdel-Barr cannot be faulted for that.

[464] That said, I do share the defendants concerns regarding Ms. Abdel-Barr's approach to costing. As was revealed in cross-examination with respect to catheters, her inclusion of a very significant and admittedly indefensible buffer indicates that some general caution is appropriate in assessing her discretionary recommendations.

[465] Mr. Benning, by agreement of the parties, provided a supplemental future care costing table for the Abdel-Barr Report recommendations (Table 6 – Additional Calculations) ("CFC Table") that takes into account mid-trial agreement regarding life expectancy. The CFC Table was used as a reference document by both counsel in making final submissions and will be put to similar use here.

[466] The CFC Table sets out a final present value sum for all future care claims of roughly $4,000,000. That amount was reduced to about $3,600,000 by concessions made in the plaintiff's closing argument. The defendants submit that a future cost of care award in the range of $2,000,000-$2,250,000 is appropriate.

C. Medications

[467] The plaintiff testified that he was open to trying other anti-depressants and was waiting to see a pain medicine specialist. The plaintiff seeks an award of **$20,000** for the anti-depressants and as a contingency award for other medications that may be recommended as part of a program. I accept that as reasonable.

[468] The plaintiff also seeks $8,986 as the cost for continued use of Senokot and PEG powder, both of which he uses to address bowel issues. While Dr. Purtzki expressed the view that these treatments are insufficient on their own, she did not

contest that it would be appropriate to continue them. The amount of **$8,986** is awarded.

[469] The plaintiff seeks $60,000 with respect to the “Recommended Medications” set out in the CFC Table. Some of the listed medications are recommended for trial by Dr. Lu, on the basis that they should be continued indefinitely should they prove effective. These are medications to help with sleep, an anti-depressant, a low dose anti-psychotic and a treatment for pain management. The plaintiff seeks 50% of the costed value of the recommended drugs to account for the fact that some of the drug trials may be unsuccessful. The list of recommended medications includes Viagra. The plaintiff testified that he tried Viagra already and that it did not work for him, but that a sexual health consultant at GF Strong had recommended a different treatment and that treatment had been successful in terms of maintaining an erection. It is proposed that 50% of the costed amount for Viagra be awarded for further trial and possible continued use of this alternative treatment.

[470] The plaintiff was already awarded costs for an anti-depressant under the previous CFC Table heading and thus the anti-depressant portion of the claim is duplicative, but the proposed approach is otherwise reasonable. The plaintiff is awarded **$51,000**.

D. Therapies

[471] The plaintiff claims a total of $479,423 for future recommended occupational therapy, physical therapy (physiotherapy, massage and kinesiology), psychological counselling, a pain management program, and a GF Strong SCI Inpatient Rehabilitation Program (with travel, accommodation and food costs).

1. Psychological – Initial and Ongoing

[472] Dr. Lu and Dr. Riar agree that the plaintiff needs urgent psychiatric treatment to address his severe depression, anxiety and the fact that he has thus far proven unable to come to terms with his disability. Dr. Purtzki agrees that immediate help is required for those issues, but also opines that the plaintiff needs grief counselling

and will likely require repeated periods of counselling throughout his life. In Dr. Purtzki's opinion, the plaintiff will need at least 7-8 periods of counselling (each consisting of about 12-20 sessions) to address the times of transition and/or crisis that he will likely face during his lifetime. While Dr. Riar recommended an initial round of counselling followed by counselling "if needed", I find Dr. Purtzki's recommended approach to be reasonable and appropriate.

[473] Ms. Abdel-Barr did not cost out Dr. Purtzki's recommendations, she did cost out Dr. Cohen's. Dr. Cohen recommended 15-18 initial sessions, followed by four cycles of 13-15 sessions over his lifetime, all with a registered psychologist. In my view, that is substantially similar to what Dr. Purtzki has recommended and represents a comparable expense. The CFC Table's present value for that treatment is $14,360, plus an additional 4-6 sessions of counselling per year for ongoing support at $26,025, for a total present value of **$40,385**. That amount is awarded.

2. Occupational Therapy

[474] Ms. Abdel-Barr recommended "occupational therapy/case management" services from an occupational therapist at the rate of four hours per month on a lifelong basis. This is intended to enable the occupational therapist to address rehabilitation and coping strategies, equipment issues, facilitate home accessibility and coordinate the plaintiff's rehabilitation services as needed. She has identified the objective of the service as maintaining health through a coordinated approach to care. The defendants do not disagree with the concept, but submit that 48 hours a year is excessive and ask the Court to prefer Mr. Padvaiskas' recommendation for 24 hours of occupational therapy a year.

[475] This is an area where Ms. Abdel-Barr's extensive experience dealing with people with SCI injuries is weighty. I am satisfied that the plaintiff will need a coordinated and consistent health care approach in order to improve, that the organization and scheduling involved will be complicated. The plaintiff testified that he has difficulty negotiating the systems and organizing treatments and services on his own since his return to New Brunswick. The recommendations made for future

care and the fact that he is more likely to be seeking more treatments and assistance now that his HO surgery has been completed will only make that more challenging in the future. I accept Ms. Abdel-Barr's recommendation for these services at a present cost value of **$155,307**.

3. Vocational Services

[476] Dr. Lu recommended vocational assistance (including in relation to volunteering and recreation) through the plaintiff's lifetime. The related recommendation in the Abdel-Barr Report provides for an initial vocational assessment followed by 25 hours of vocational counselling over the plaintiff's lifetime. The defendants accept the recommendation made in the Abdel-Barr Report and the CFC Table costing for the initial assessment at $2,957.

[477] The defendants take issue, however, with the CFC Table calculation ($109,200) for the 25 hours of counselling over his lifetime. I agree that something appears to have gone awry. (Page 53 of the Abdel-Barr Report indicates the 25 hours lifetime has been mis-entered as 25 hours annually.)

[478] The award will be **$2,957 for the initial assessment and an amount for a total of 25 hours counselling** over the course of his lifetime. I leave it to the parties to calculate and agree upon the present value cost of the 25 hours counselling (using the average session cost set out in the Abdel-Barr Report).

4. Physiotherapy and Massage Therapy

[479] The plaintiff seeks $2700 annually for physiotherapy and $2454 annually for massage therapy.

[480] Ms. Abdel-Barr provides for 36 hours/year of physiotherapy support, plus additional support in case of future injuries or surgery. The defendants submit that this is excessive and that Mr. Padvaiskas' recommendation for 12-18 hours/year is reasonable. With respect to massage therapy, they submit that the plaintiff has not had any massage therapy treatments since the Accident and thus is unlikely to have any in the future.

[481] The Abdel-Barr Report indicates that the physiotherapy is based on Dr. Anton's recommendation. Dr. Anton recommended the evaluation and development of a physiotherapy program (range of motion, stretching) based on the plaintiff's level of injury, and massage therapy for pain relief.

[482] The amount of physiotherapy and massage therapy provided for is Ms. Abdel-Barr's own recommendation. Her report indicates that her recommendation reflects the plaintiff's pre-HO surgery level of pain, range of movement issues and discomfort issues. The HO surgery has significantly improved these.

[483] Both Dr. Anton and Dr. Purtzki's recommendations suggest there will be less need for physiotherapy over time. The plaintiff seeks $75,966. The amount of **$60,000** is awarded. The plaintiff sought a separate award of $5,340 for additional physiotherapy that may be required following surgical management of fractures sustained in the future. I am satisfied this additional claim is unjustified in light of the lifetime allowance already granted.

[484] While the plaintiff has not had any massage therapy since the Accident, I am satisfied that he is more likely to do so now that he has had his HO surgery (and is both more mobile and in less pain). He is also more likely to use massage therapy for pain management in the context of the exercise programs recommended for him and which he can now pursue post-HO surgery. Ms. Abdel-Barr's recommendation is based on two treatments per month. I do not consider that as unreasonable. The award will be **$69,034** as sought.

5. Health and Strength Maintenance

[485] Dr. Anton recommended a kinesiologist to develop an exercise program specific to SCI, with exercise for strength training and 20 minutes of aerobic activity two times a week. Notably, along with intensive physiotherapy for at least one and a half years, Dr. Purtzki recommended three strengthening sessions a week. Dr. Purtzki also recommended the plaintiff have a rehab assistant for the next two to three years to help him perform stretches, exercises, attend the gym or follow a home gym program.

[486] Ms. Abdel-Barr recommends six hours weekly with a kinesiologist for life and a gym membership for life. These two recommendations cost out in the CFC Table at $630,936 and $19,802 respectively. She states that a kinesiologist is the most appropriately trained individual to reinforce therapy goals and maintain safety precautions related to risk of fracture.

[487] The defendants submit that Ms. Abdel-Barr's kinesiology recommendation is excessive and that Mr. Padvaiskas' recommendation of 24 sessions annually for the next two years, followed by a yearly provision of 6-12 sessions is reasonable.

[488] The tenor of Dr. Anton's recommendation was that the development of the exercise program should be overseen by a kinesiologist. That presumably includes development of an initial program and adjustments over time to ensure it remains appropriate. There is medical support for an intensive approach during the first several years, but I agree with the defendants that Ms. Abdel-Barr's kinesiology recommendation is excessive. I do not find there to be reasonable justification to require a kinesiologist to be present at each session for the rest of the plaintiff's life.

[489] I am satisfied that the approach (as opposed to the numbers) recommended by Mr. Padvaiskas is appropriate. He has recommended an initial period of close work with a kinesiologist followed by regular consultation to ensure the plaintiff's program continues to be appropriate and that the plaintiff is performing it satisfactorily.

[490] The CFC Table identifies the annual cost of working with a kinesiologist at Ms. Abdel-Barr's recommended level of six hours a week as $22,425. I accept that as an appropriate treatment schedule for a period of 3 years, and award **$65,000** to cover the initial three-year period.

[491] **After three years, the plaintiff should be entitled to up to 16 sessions annually,** to ensure that he is regularly monitored to ensure exercises are being done properly and to enable the kinesiologist to make any required adjustments to the program. The parties should be able to agree on a present value amount of the

costs of 16 sessions a year based on the session costing set out in the Abdel-Barr Report.

[492] With regard the gym membership, the defendants note that the plaintiff told Ms. Abdel-Barr that he went to the gym “religiously” before the Accident and argue that the plaintiff would have had a gym membership in any event of the Accident. I accept the defendant’s submission on this point.

6. Pain Management Program

[493] Ms. Abdel-Barr’s costing for a pain management program was based on a recommendation made by Dr Cohen. Neither Dr. Anton nor Dr. Purtzki recommended a pain management program.

[494] The plaintiff already had the benefit of an extended inpatient rehabilitation period with GF Strong following his HO surgery, and he on a waiting list to see a pain specialist.

[495] No award is made for the cost of attending a pain management program.

E. Sexual Health

[496] The plaintiff testified that he wished to have children and that he and Ms. Williston had plans to do so. Ms. Abdel-Barr recommended sexual health services and associated IVF treatments to try to have a child. The plaintiff claims $3,986 (sperm freezing and storage), $41,513 (three IVF treatments), and $17,266 (related travel costs from Miramichi), for a total $62,765.

[497] The defendants concede that the plaintiff’s plans are not speculative insofar as he and Ms. Williston are concerned, but object to the specific recommendations as ungrounded by evidence. They note that the recommendation is solely made by Ms. Abdel-Barr and that there is no medical evidence regarding, for example, the success rate of IVF, the number of cycles required, the viability of the plaintiff’s sperm, or whether less intensive medical procedures might suffice (e.g., intrauterine insemination).

[498] Ms. Abdel-Barr's evidence is that the costed recommendation is based on her own experience working with SCI individuals and consultation with an unidentified sexual health clinician at VGH's spinal cord centre. I agree with the defendants that there is insufficient evidence to support an award based on Ms. Abdel-Barr's unsupported recommendations.

F. Orthotics

[499] There is evidence that the plaintiff used orthotic braces (and crutches) to get around before his HO progression made it too difficult. He testified that he hopes to return to using braces regularly. Braces are recommended for him by both Dr. Anton and Dr. Purtzki. The plaintiff seeks an award for the cost of new braces at $14,500 every five years during the plaintiff's life expectancy (present value of $87,456) and $350 in brace maintenance every year aside from year of purchase (present value of $7,736).

[500] The defendants object the fact that the plaintiff seeks an amount for braces for his full life expectancy, while also seeking an award to provide for a power wheelchair as of age 55. I agree that the proposed overlap is excessive and unreasonable.

[501] No submissions were made with respect to appropriate adjustments. I will address it by deducting $13,000 from the total present value amount sought in respect of braces. Therefore, I award **$82,192** (i.e. $95,192 - $13,000).

G. Wheelchair-Related

[502] The plaintiff claims for a manual wheelchair (cost of $10,000) every 5 years from 2024 forward (present value $56,226) and for a power wheelchair (cost of $27,500) for every 5 years from age 55 (present value $63,242).

[503] The defendants object that these claims involve unreasonable overlap. I agree. While there might well be some brief overlap, 15 years of overlap is excessive and unreasonable. To address the overlap, I will deduct $12,000 from the total present value of $119,468 and therefore award **$107,468**.

[504] The plaintiff advances a detailed claim for wheelchair accessories and maintenance. These total $41,747 present value. As with the chairs themselves, the maintenance claim involves overlap. To address the overlap, I will deduct $5,000 from the present value amount of $41,747 and therefore award **$36,747**.

H. Assistive and Adaptive Equipment

[505] The Abdel-Barr Report costs out equipment for the plaintiff consisting of: forearm crutches, a bath transfer bench, a raised toilet, a bed, a pressure-relieving mattress and mattress overlay system to assist with pressure relief and skin integrity. Dr. Anton recommended a bed and pressure-relieving mattress as assistive equipment. Dr. Purtzki opined that the plaintiff may require a hospital bed for home use at some point.

[506] The CFC Table costs the present value of these and replacement items over the plaintiff's lifetime at a total of $78,866.

[507] The defendants object that the costing for the bed and mattress do not account for the fact that the plaintiff would have had to buy some kind of bed and some kind of mattress in any event.

[508] While the plaintiff would no doubt purchase a mattress and bed as an adult, he would not be purchasing a bed or mattress of the type and quality recommended for his medical purposes. Nor would a regular bed be likely to be replaced at the recommended frequency that could be justified in relation to an adjustable bed. The plaintiff is awarded **$75,000**.

I. Supplies

[509] The CFC Table contains a "Supplies" section that costs out to a total present value of $644,573. This section includes catheters ($575,087), gloves ($38,476) and lubricant ($10,269). The usage rate of these three items are inter-related.

[510] In closing argument, the plaintiff conceded that his current catheter daily usage (5-6) does not approach that (8-12) provided for under the Abdel-Barr Report.

He submitted, however, that on re-examination Ms. Abdel-Barr explained that her usage numbers also took into account, in addition to potential breakage, the possibility of a usage rate as high as every 2 hours. The plaintiff reduced the amount of his present value claim with respect to catheters to $450,000 in light of the evidence with respect to the plaintiff's actual usage.

[511] The defendants maintain that the evidence only justifies an award of $375,000 for catheters.

[512] While Ms. Abdel-Barr did mention the possibility of usage as frequent as every 2 hours, there is no evidence about why, how often, or for how long that rate might occur. There is no evidence to support counsel's submission that usage rate increases with age.

[513] While some buffer for reasonable rate variation is justified, there is no evidence justifying the levels claimed by the plaintiff. Further, as the evidence is that the glove and lubricant are used in direct proportion to the catheters, it appears those categories should also be reduced under the plaintiff's concession.

[514] I award a present value total with respect to Supplies of **$469,486.** That number reflects a deduction with respect to catheters, gloves and lubricant.

J. Health and Maintenance Equipment

[515] The evidence establishes that remaining fit and active is essential for the plaintiff's future well-being. The CFC Table provides for a standing frame, exercise table and mat, and a zero-gravity recliner, with replacements for life. All of these items are recommended by Ms. Abdel-Barr. With the exception of the zero-gravity recliner, these items are directed at maintaining fitness and function.

[516] Notwithstanding that the recommendation for the zero-gravity recliner was based on Ms. Abdel-Barr's pre-HO surgery assessment of the assessment, the plaintiff testified that post-surgery he has developed increased spasticity, in particular on changes of position. I am satisfied it remains appropriate post-surgery.

[517] The defendants take issue with the claim for a $10,000-$15,000 hand cycle (and replacements) given that the plaintiff previously purchased a hand cycle for only $5,500. The listing in the CFC Table is specifically for an off-road hand cycle. Use of off-road hand cycle corresponds with the plaintiff's pre-Accident interests and activities. There is evidence that it would be suitable for use in Miramichi given the surrounding local paths and near-by rural and semi-rural roads. The plaintiff testified that he would use an off-road handcycle for exercise and also as a means of local transportation. I find the claim for an off-road handcycle is justified.

[518] I accept that the items found under this heading in the CFC Table are all reasonably justified and award a present value total of **$144,274**.

K. Assistance Technology

[519] I accept Ms. Abdel-Barr's recommendation for assistive technology as support for independent living, with an initial investment allowance and an ongoing annual budget. This is intended to allow the plaintiff to obtain voice-activated assistive technologies for household use and personal activities. The total present value amount of **$10,000** is awarded.

L. Vehicle Adaptation

[520] The CFC Table listed items here include a hoist arm for the truck, various power accessories, hand controls and related secondary function controls, along with renewals and maintenance for same. The present value total of **$133,856** is awarded as sought.

M. Medical-Related Transportation Costs

[521] The plaintiff seeks $1600 annually for the costs of attending medical appointments, including appointments requiring travel outside Miramichi. It is undisputed that many of the health services the plaintiff needs will require him to travel to larger city centres. The present value amount of **$45,017** is awarded as sought.

N. Home Support

[522] Further to Ms. Abdel-Barr's recommendations (Abdel-Barr Report, p. 62), the CFC Table provides costing for personal care at 45 hours annually; regular home cleaning services at 156 hours annually; meal preparation at 156 hours annually; seasonal cleaning annually; a one time move of residence; interior home maintenance of 22 hours annually; exterior home maintenance (including seasonal outdoor cleaning and snow removal); and 48 hours annually for yard and garden care. The total present value amount sought under this heading of the CFC Table is $376,674.

[523] The defendants submit that the claim for meal preparation is unreasonable, noting that the plaintiff testified that he was capable of preparing simple meals at his parents' home. They argue that once the plaintiff has an accessible home, he will not require assistance with meal preparation and that only an allowance for grocery delivery is reasonably justified.

[524] The defendants also object that Ms. Abdel-Barr has provided for snow clearing services separately, but still included monthly yard and garden care over the winter months. They also object to the cost for construction of raised garden beds on the basis that there is no evidence that the plaintiff has any interest in gardening.

[525] I am satisfied that there is some overlap between these various heads given their fluid nature and the significant number of hours Ms. Abdel-Barr has allocated under each head. I agree that there is no evidentiary basis justifying the construction of raised gardening beds. I also find that the recommendation for meal preparation hours fails to account for the fact that an award is also sought to enable the plaintiff to have an accessible home and kitchen. In addition to cooking, an accessible home should also enable the plaintiff to perform other tasks for himself (e.g., accessible laundry facilities). I am satisfied that a $100,000 deduction is warranted to account for these assorted issues with the claim. The plaintiff is awarded **$276,674**.

O. Increased Personal Support With Age

[526] The CFC Table seeks additional funds for personal care after age 55. Both Dr. Anton and Dr. Purtzki note that the plaintiff will become less independent with age. In closing submissions, the plaintiff reduced the amount sought to $166,000 to account for contingencies. As reduced, the amount was not contested. The plaintiff is awarded **$166,000**.

P. Accessible Housing

[527] The plaintiff seeks a present value award of $169,199 for the extra cost of buying and/or the cost of renovating to create an accessible home. Based on her own research, Ms. Abdel-Barr reports that appropriate renovations (in Miramichi) would have an average cost of $175,000.

[528] The defendants submit that this amount is excessive given that the plaintiff does not currently own a home and thus is in a position to purchase one that requires minimal renovations. However, the defendants provided no competing evidence on renovation costs or the cost or availability of suitable or readily converted accessible housing available in Miramichi.

[529] I accept Ms. Abdel-Barr's estimate of the cost. The plaintiff is awarded **$169,199.**

Q. Financial Management

[530] The plaintiff seeks annual funding: for a financial manager/professional trustee; an accountant for tax preparation; and a bookkeeper. These recommendations are made by Ms. Abdel-Barr and are said to be due to the plaintiff's cognitive function and vulnerability (Abdel-Barr Report, p. 46).

[531] The defendants submit that neither a financial manager nor bookkeeper is reasonably justified. They argue that the plaintiff would most likely have engaged an accountant to prepare his taxes in any event of the Accident. The defendants also submit that if financial management costs are appropriate, they should be dealt with

under the management fee head of damages, not subsumed under future costs of care.

[532] I agree that the plaintiff was likely to engage an accountant to do his taxes in any event. I also agree that there is no evidence that a bookkeeper is warranted.

[533] The Court of Appeal defined and explained the purpose of management fees in *Lines v. Gordon*, 2009 BCCA 106 at para. 108:

> A management fee is intended to compensate for the cost to the plaintiff of management and investment of the lump sum damage awards for future care and loss of future earnings. It is a sum that may be given to ensure those awards fully compensate the plaintiff as was intended by the court, without erosion by expenditures for professional management.

[534] In contrast, the objective of future care costs is to restore a plaintiff to the position he would have been in had the accident not occurred: *Gill v. Borutski*, 2021 BCSC 554 at para. 107.

[535] The plaintiff seeks financial management fees on the basis of his vulnerability and cognitive impairment. The plaintiff's cognitive impairment is mild. There is no suggestion that he would be unable to provide direction to a financial advisor and there is no evidence that he would ever had engaged in stock trading and financial investing on his own behalf. There is no award for financial management as an aspect of future care.

V. In Trust Claims

[536] The plaintiff advances in trust claims with respect to both Corina (his mother) and Joey (his brother).

[537] The principles applicable with respect to an award for "in trust" claims are as summarized by Justice Dley in *Sharp v. Song*, 2021 BCSC 1422 [*Sharp*]:

> [143] The factors to consider when assessing an in trust claim are set out in *Bystedt v. Hay,* 2001 BCSC 1735 at para. 180, aff'd 2004 BCCA 124:
>
> > [180] From a review of these authorities one can construct a summary of the factors to be considered in the assessment of "in trust" claims:

> a) the services provided must replace services necessary for the care of the plaintiff as a result of the plaintiff's injuries;
>
> b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship...;
>
> c) the maximum value of such services is the cost of obtaining the services outside the family;
>
> d) where the opportunity cost to the caregiving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
>
> e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and
>
> f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[538] In this case, it is an interesting twist on the facts that Corina is, in fact, employed as a personal support worker (or care aide). She was on leave from work for unrelated family reasons at the time of the Accident. She did not return to work after the plaintiff returned to Miramichi and began living in the family home.

[539] With respect to Corina, the plaintiff claims $28,600 per year for the support services she provided to the plaintiff between the date of the Accident and the date of the trial. The plaintiff's calculation is based on her providing 25 hours of care to the plaintiff per week based on an average hourly rate of $22 per hour. The $22 rate represents the average between the $19 rate she was earning prior to the Accident and the hourly rate of $25 that she testified she would be earning if she had continued working through to the date of trial. This results in a claim of $100,000.

[540] The plaintiff's in trust claim with respect to Joey is based on the support services provided by Joey in the weeks immediately following the Accident and amounts to $5,000. The amount sought represents Joey's actual costs to travel and stay in Vancouver and $3,600 in missed pay in being away from his own employment. The defendants do not dispute Joey's $5000 claim.

[541] The defendants concede that Corina is entitled to an in trust award with regard to the time she spent in Vancouver while the plaintiff was in VGH and GF Strong immediately following the Accident. The defendants submit that a sum of $10,000 is an appropriate in trust award for Corina to cover the period of time from the Accident to the plaintiff's return to Miramichi.

[542] The defendants dispute the portion of the in trust award claim that seeks to have Corina compensated at or near what she would have earned had she returned to work after the plaintiff moved back to Miramichi.

[543] The defendants argue that there is no evidence as to the number of hours Corina spends on tasks specifically for the plaintiff due to his injuries in a given day. They argue that Corina assists with laundry because the plaintiff cannot access the basement, she prepares larger meals (about 50% of meals), she retrieves clothing for him because his bedroom is not fully accessible, and cleans up after fecal incidents. However, they submit that Corina's evidence is that she is cooking for herself and her husband anyway when she also cooks meals for the plaintiff and that the plaintiff usually eats whatever they are having. They also note that Ms. Williston's evidence indicates that the number of fecal incidents are down to a couple times a month.

[544] The defendants contrast the facts of the present case to those in *Sharp*, where the Court stated:

> [145] Ms. Sharp seeks an award of $50,000. That might be appropriate if Mr. Sharp was completely disabled, but that is not the case. He does not require constant care and is able to contribute to the household chores and some oversight of their son. It is expected that with proper treatment (which has been compensated for elsewhere in this decision) that his condition will improve to some degree and Ms. Sharp's level of support will be lessened.
>
> [146] Taking all of the *Bystedt* factors into account, I award the sum of $10,000.

[545] By comparison, they say the plaintiff does not require constant care or supervision and, while he may not contribute to household chores, he remains independent in general activities of daily living and also spends much of each day

with Ms. Williston. The defendants argue that the amount of care Corina has provided to the plaintiff is not an amount that would reasonably prevent her from returning to the part time work (25 hours a week) that she was working before she went on leave.

[546] They argue that in trust damages should not be assessed on an "opportunity cost" basis (i.e., in terms of Corina's potential earnings) here, but rather based on the cost of obtaining the services should would not provided in any event from someone outside of the family. They argue that Ms. Abdel-Barr's cleaning and personal care costing for the same period of time would amount to only $13,241, and that is the amount that should be awarded for the period after the plaintiff's return to Miramichi.

[547] Corina was, quite naturally, very concerned about the plaintiff following his return to Miramichi. He was distressed and she testified that she wanted to be there to look after him and to be available to help. Without doubt, part of the reason she stayed home with the plaintiff was due to familial relationship and maternal affection.

[548] I agree that Corina was not required to decline to return to part-time work and that much of what she did for the plaintiff was incidental to her usual family role (e.g., making dinner for the household). But I do not accept that it would have been sufficient to employ cleaning and personal care services following his return to Miramichi equivalent to those Ms. Abdel-Barr has recommended for the future. The plaintiff was newly disabled and it was unclear what he would be able to do for himself. After a few months, the progression of his HO was a complicating factor and many things were made more difficult than they are now post-surgery. The plaintiff was also distraught about his fecal incidents and it would have been reasonable for him to have on demand personal care provided in the circumstances and that would have involved significant cost as opposed to simply having scheduled care.

[549] In my view, the defendant's proposed amount of $10,000 is a fair award for the period of time prior to the plaintiff's return to Miramichi. Subsequent to that, I

would award $20,000 in total for the period of time up to the trial, for a total of $30,000.

[550] The plaintiff is awarded **$5,000** as an in-trust claim for Joey and **$30,000** as an in trust claim for Corina.

VI. SPECIAL DAMAGES

[551] During the trial, the parties reached an agreement on special damages. It is agreed that special damages amount to a total of $119,918.27, subject to the defendants' reservation of the right to deal with deductions/offsets.

VII. HCCRA

[552] A certificate in the amount of $132,107.92 was issued on behalf of the Minister of Health under the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 [*HCCRA*] and is in evidence. I therefore award additional special damages in that amount and, pursuant to s. 20 of the *HCCRA*, I designate **$132,107.92** as the amount of the judgment that is applicable to the healthcare services claim.

Summary

[553] I have concluded that Mr. MacLellan was the driver and that the defendants are liable for the Accident.

[554] Mr. Somers was contributorily negligent in failing to wear his seatbelt. The liability is apportioned as 75% to the defendants and 25% to Mr. Somers.

[555] After accounting for the various contingencies, the plaintiff is entitled to a damage award totalling **$6,107,691,** broken down as follows:

Non-Pecuniary Damages	$439,000
Loss of Earning Capacity	
Past Loss of Earning Capacity	$411,083

Future Loss of Earning Capacity	$2,782,000
Cost of Future Care	
Medications	
Anti-Depressants	$20,000
Senokot and PEG Powder	$8,986
Other Recommended Medications	$51,000
Therapies	
Psychological Therapy (initial)	$14,360
Psychological Therapy (ongoing)	$26,025
Occupational Therapy	$155,307
Vocational Services Assessment	$2,957
25 hours of Vocational Counselling	*
Physiotherapy	$60,000
Massage Therapy	$69,034
Kinesiologist	$65,000
Kinesiologist (16 sessions/year starting year 4)	*
Other	
Orthotics	$82,192
Wheelchairs	$107,468

Wheelchair Accessories	$36,747
Assistive and Adaptive Equipment	$75,000
Supplies	$469,486
Health and Maintenance Equipment	$144,274
Aids for Independent Living	$10,000
Vehicle Adaptation	$133,856
Medical Transportation Costs	$45,017
Home Support	$276,674
Personal Support with Age	$166,000
Accessible Housing	$169,199
In Trust	
Joey	$5,000
Corina	$30,000
Special Damages	$119,918.27
***HCCRA* Claim**	$132,107.92
TOTAL	$6,107,691

*Parties to calculate and agree upon present value based on costing in Abdel-Barr Report.

[556] I leave it to the parties to consider the results of this judgment and address any outstanding present value calculations in accordance with my findings and

directions, residual costs, tax, management fees, gross-up, statutory deductions, or interest implications. If they are unable to agree on these matters, they are at liberty to request a hearing to make further submissions. Any application by the defendant for statutory deductions should be served within the next 90 days.

"Tucker J."