

CANADA / JUDGMENT

Fryer v. Nakusp (Village)

2022 BCSC 497

COURT

Supreme Court of British Columbia

DECIDED

28 March 2022

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2022 BCSC 497 Fryer v. Nakusp (Village)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fryer v. Nakusp (Village),

2022 BCSC 497

Date: 20220328

Docket: M55017

Registry: Vernon

Between:

Douglas Charles Fryer

Plaintiff

And:

Marilyn Anne Massey and Village of Nakusp

Defendants

Corrected Judgment: The text of the judgment was corrected on the front page and para. 249 on April 19, 2022

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

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Place and Dates of Trial/Hearing:

Kamloops, B.C.

July 5-9, 12-14, 2021

Place and Date of Judgment:

Kamloops, B.C.

March 28, 2022

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I. Introduction

[1] On the evening of March 21, 2018, Mr. Fryer, a retired widower, was walking along a rural road near Nakusp on his way to visit a friend when he was struck from behind by a car driven by Ms. Massey ("Accident"). At the time of the Accident, Mr. Fryer had almost completely recovered from a successful and life-altering spinal surgery that had significantly improved his quality of life. As a result of the Accident, Mr. Fryer suffered a spinal fracture, a leg fracture, soft tissue injuries and a mild to moderate traumatic brain injury. He also suffers from continued anxiety relating to the Accident.

[2] Ms. Massey denies any liability for the Accident. In the alternative, she submits that if she is liable for the Accident, Mr. Fryer is contributorily negligent. Mr. Fryer submits that Ms. Massey is entirely responsible for the Accident. He seeks nonpecuniary damages, costs of future care, damages for loss of housekeeping capacity and special damages.

[3] The defendant Village of Nakusp was released from this action before the trial commenced.

II. The Background Facts and Surrounding Circumstances

- [4] Mr. Fryer was 65 years old at the time of the Accident. He lives in a modest log home in an "off-the grid" area of the West Kootenays, near the small town of Burton. Burton is on the east side of Arrow Lake, an approximately 30-minute drive south of Nakusp. The relatively remote location of Mr. Fryer's home in the woods becomes a significant factor affecting the quality and cost of his care during his rehabilitation period following the Accident.
- [5] At the outset, I would note that Mr. Fryer was a very impressive witness. He sometimes digressed in responding to questions put to him on both direct and cross-examination, very likely as a result of his brain injury, particularly when speaking with deep affection about his deceased wife Kathy, or when recounting with great fondness the years prior to her death when the couple raised their two children. Despite his digressions, he was very candid, respectful and consistent in his responses, particularly during rigorous cross-examination. Contrary to counsel for the defendant's able assertions, I find that any inconsistencies in his recollections are understandable and inconsequential given the passage of time and the trauma he has so stoically faced. I found him to be an honest and reliable witness who did not exaggerate or confabulate when responding to questioning on direct or cross-examination.

A. Pre-Accident Years

- [6] Mr. Fryer moved to Canada in the mid-1970's from New Jersey. He was attracted to the beauty of the West Kootenays, which he calls "God's country." Mr. Fryer and his wife Kathy were married in 1979. He had been previously married and had two children. He purchased and renovated their 1.5-acre homestead near Burton, where he has lived ever since, except during periods of recuperation before and after the Accident. Mr. Fryer very much enjoys the country life.
- [7] Except for driving to Kelowna once a month to stock up on some supplies, the Fryers were self-sufficient: they hunted and fished, grew their own garden, and raised sheep, chickens, birds and horses. Their water supply was pumped from their own well. Their garden was watered by an irrigation system that Mr. Fryer constructed using water from a creek by their property. Their source of heat was a wood stove; for fuel, Mr. Fryer would chop wood from the adjacent forest, stocking up for the winter season. Mr. Fryer also worked in the forestry industry as a lumberjack, and later as a firefighter running his own crews.
- [8] In the years prior to the Accident, life became very challenging for the Fryers. Mr. Fryer coped not only with the loss of his wife, who ultimately died of cancer in 2014, he also struggled with a spinal deformity. Following his retirement, despite his spinal condition and regular migraines, Mr. Fryer was committed to taking care of his wife as her illness progressed. He was her primary caregiver for 3.5 years until she finally succumbed to her illness. Mr. Fryer tended to his wife, whom he calls "the love of his life," with great care on his own, except for a friend who would help bathe his wife. He explained that his wife was

with him at their home during the entire period of her illness, except for one month after her surgery when she was in the hospital, and the last month of her life. During this time, he kept track of her medication, cooked their meals, and maintained their home and property. He explained on cross-examination that he "had help from above," ignored his own pain, and pushed through.

- [9] After his wife's death Mr. Fryer's spinal condition worsened to a point that he was very bent over at the waist, at about almost a 90 degree angle. He was able to drive but struggled with walking. While he described himself as being a "shut-in", true to his character, he carried on. He continued to fish and hunt. He obtained a handicapped hunting licence and enjoyed driving his all-terrain vehicle ("Quad") into the woods. He recounts driving to, and fishing at, a waterfall where the fishing was "great", noting that the "rainbows" there were particularly large. He also fished off the Burton wharf and "walked" his dog while riding his Quad. Mr. Fryer also drove his truck to run various errands such as grocery shopping and attending to his mail at the post-office. Before his life-altering surgery and before the Accident, it would sometimes take Mr. Fryer several trips over a three-day period to carry all his groceries into his home. Yet, Mr. Fryer persevered. He continued to cook, clean the house and use the wood stove. A neighbour ploughed his driveway in the winter for him with her "skid steer." From time to time, ladies from the local church brought him food. Mr. Fryer testified that during this period, his daughter, Ms. Meadow Fryer, who lives in Nakusp, was very busy raising her children so that she could not visit him too often. He explained she was a hockey mom. Despite his physical challenges Mr. Fryer managed, and remained an outdoorsman in his own way.
- [10] Mr. Fryer suffered from migraines from time to time, which he treated with Maxalt. He testified that this medication "helped a lot" and that, prior to his retirement, he never "lost work to a migraine." He recalls there were different triggers such as bright lights or not eating.
- [11] In 2016, Mr. Fryer saw Dr. Kailia to treat chronic pain and muscle spasms in his lower back. Dr. Kailia testified that in November 2016 Mr. Fryer received trigger point injections in his low back, and nerve blocks at the bottom of his spine, to assist with his pain management. With the help and advocacy of a nurse practitioner, Mr. Fryer learned of a procedure that might correct his spinal deformity. In October of 2017, Mr. Fryer underwent an extensive and complex surgery at Vancouver General Hospital. The 12-hour surgery involved placing a steel rod and other "hardware" in his spine. Mr. Fryer describes how they "cut me open from my neck to my butt and reconstructed my spinal column." The surgery was a success, with no complications.
- [12] Mr. Fryer describes that he was so bent over prior to the surgery that he would have to bend his knees to look up. He needed a walker to get around. After his surgery, he could stand "straight up and down" and as he recuperated, he gave up his walker altogether and began walking on his own.

- [13] After his surgery, Mr. Fryer was discharged from Vancouver General Hospital to Arrow Lakes Hospital in Nakusp, and after that to the Pavillion facility at New Denver Hospital. He said he "never used a wheelchair" and began his rehabilitation by walking with a walker. Mr. Fryer testified that, after his surgery: "I didn't have the pain I had before just pain from surgery and it was getting less and less." Mr. Fryer's recuperation went smoothly to the point that his back felt "great" before the Accident occurred.
- [14] In December of 2017, Mr. Fryer went to live with his daughter, Meadow. She lived with her children just outside the town of Nakusp. The plan was that he would return to his home in Burton once the snow melted.
- [15] Mr. Fryer describes how after the surgery and before the Accident he felt "ecstatic", as if he was "on cloud nine". He testified that the results of the surgery were "incredible", describing that: "it gave me my life back I could stand straight and walk I could stand without leaning on anything." He describes how happy he was to just look up and see the sky and birds once more.
- [16] After the surgery and before the Accident, Mr. Fryer was cooking, cleaning and grocery shopping. He could walk four to five kilometres at a time. He describes how he felt "wonderful" after these walks and he was pleased that he had "muscle tone." He attributed his quick recuperation and his ability to walk these distances to his determination to get better, noting that even in the hospital: "I never stayed in bed after surgery." He recalls how he "did loops around the nurses' stations - same at New Denver." He describes his attitude towards his rehabilitation: "I gave my rehab everything I had - I was determined."

B. The Accident

- [17] On the night of the Accident, Mr. Fryer was out for his fourth walk that week. He was walking to a friend's home to pick up his dog. He testified that the snow had melted on the roadway and he could have "walked for miles". That week he was going for walks that were four to five kilometres long. He was no longer restricted to his walker, or to doing just home exercises or walking around the deck of his daughter's home. He explained he made a point of walking as much as he could as part of his rehabilitation efforts.
- [18] He testified that he was walking on the right side of the road on 10th Avenue NW ("10th Ave") when he was struck, explaining that there are street lights on the right side of 10th Ave but not on the left side of the road. He commented that other pedestrians on that street also walk on the right side of 10th Ave and that 10th Ave was a "main pedestrian route". There is no dividing line in the middle of 10th Ave and no lines on either side of the roadway.

- [19] It was dark out at the time of the Accident. Mr. Fryer testified that he was wearing grey sweatpants, a dark jacket and a day-pack on his back that was marked with stripes and a white insignia. He was also wearing a white bandana that was faded. He was wearing leather boots, like work boots, with a good rubber sole. He had a walking stick that his grandson had made for him, which had a sentimental value to him but which he did not use as a cane. He was also holding a headlamp in his other hand.
- [20] There are no sidewalks on 10th Ave. Mr. Fryer recalled that it had rained a couple of days before and the shoulder of the road "was not very good to walk on" because it was muddy and was strewn with debris such as branches and leaves. There were also snowbanks on the shoulder of the roadway. He was walking on the edge of the paved roadway just before the Accident. He had turned on his headlamp, was holding it in his hand, and was pointing it on the edge of the pavement so he would not trip over its lip.
- [21] On his walks, Mr. Fryer enjoyed waving to passersby, including drivers of cars passing by him on the road. If someone was driving on the road behind him, he would turn around to wave. He turned his headlamp off before he waved so that he would not blind the drivers with it. He testified that this is what he was in the process of doing just before he was struck down by Ms. Massey's vehicle.
- [22] Mr. Fryer recalls seeing the light cast from the headlights of the car that struck him, shining on the road before him. As was his custom, he started to turn around to wave when he felt what he described as "a total body slam." He was surprised by the impact as he thought the car was farther behind him than it was. He did not have a chance to break his fall with his hands. He hit his head when he landed on the pavement, and thinks he flew onto the car's windshield.
- [23] He recalled that Ms. Massey "never hit her brakes" and that she kept going after the impact. Mr. Fryer recalled landing flat on the pavement with his head on the ground as he watched the car drive away. He saw some object skidding along the road at the same speed as her car.
- [24] Mr. Fryer recalled seeing Ms. Massey eventually stop her car and back it up. She came over to him and picked something up and put it on his chest and said "this is yours." He told her that he thought it was her headlight assembly. She picked it up and took it away.
- [25] He recalled that he was: "laying there with my legs all twisted". He testified that his back, leg, and foot were in "terrible pain." Mr. Fryer recalled that a kind man, later identified as Mr. Hascarl, came over to help him and put blankets on him. He remembered that, when the first responders arrived, they "were wonderful." He told them that he had had back surgery and that there were "all those bolts there." He also asked if they had his bandana and walking stick, because both had great personal value to him. He was assured they did. Mr. Fryer remembers that the fire department and the police also came to the scene of the Accident.

[26] He testified that when other people showed up at the scene of the Accident, Ms. Massey told them that she had clipped him with her side view mirror. Mr. Fryer recalled saying to her that was not true and that the body of her car struck him. He recalled that Ms. Massey wanted to go home and others at the scene said she had to stay.

[27] Mr. Fryer's memory of the ambulance ride to the Arrow Lakes Hospital is limited. He does not recall being transported, but recalls being "on the operating table".

1. Evidence of Ms. Massey

[28] Ms. Massey also testified about the events surrounding the Accident. She is 81 years old and a retired music teacher. She recalled the Accident occurred after 9:00 p.m., because this is when her choir practice ends. She was returning home from a choir practice when the Accident occurred. On cross-examination, Ms. Massey confirmed that she struck Mr. Fryer from behind while driving southbound on 10th Ave.

[29] On direct examination, Ms. Massey testified that, as she was driving her car, moments before striking Mr. Fryer, her eyes were drawn to a light from someone's home on the left side the roadway. She stated that the light was on the porch of the house closest to the intersection of 6th Street and 10th Ave. She also agreed it was "far off". She realized she had veered her vehicle towards the porchlight and then corrected herself, veering towards the right side of the roadway before striking Mr. Fryer. She testified that she felt a "bump" or "thud" at the moment of impact and thought she had "run over a dog". She kept driving a bit and then stopped. She did not see Mr. Fryer before she hit him and, accordingly, she did not apply her brakes.

[30] Ms. Massey also confirmed the following facts during her cross-examination:

- a) on the night of the Accident, the weather was clear, with no fog or misting on 10th Ave; the roads were also clear, might have been a little damp, and it was "very dark";
- b) there were at least two large streetlights along the right side of 10th Ave that illuminated the roadway and surrounding area;
- c) it was a dark night and Ms. Massey required her vehicle's headlights to navigate home; her headlights were on and working without issue; they illuminated the roadway ahead of her and the surrounding area as she drove down 10th Ave;
- d) there were no oncoming vehicles on 10th Ave and no lights shining directly in her eyes.

[31] Ms. Massey confirmed that on the evening of the Accident, with her headlights on, she could see the road surface on 10th Ave and had a sightline of at least a few hundred metres.

- [32] When taken to a photograph of her vehicle, at the scene of the Accident, Ms. Massey agreed that the photo showed the streetlight was on and that it illuminated a large area, casting enough light to illuminate her vehicle. The photograph was consistent with Ms. Massey's evidence; the streetlight illuminated not only her car but the roadway and the shoulder area to the right of the roadway.
- [33] Ms. Massey confirmed that she was very familiar with 10th Ave. She had driven that road many times. She confirmed there was no sidewalk on either side of the road and that the street lights were located only on the right side of the road. She agreed on cross-examination that she was aware of pedestrians on 10th Ave and also agreed that it was "normally" safer to walk on the right side of 10th Ave where the street lights were located, although she added that the snow banks on the side of the road were black and repeated her evidence. When pressed, she qualified her statement, noting the snow banks were not pure black, but that they were a mixture of black and white. She also agreed that the snow banks were six feet high, were illuminated by her headlights and provided a contrast for darker objects in front of them.
- [34] Ms. Massey estimated that she was driving slower than 30 km/h when she struck Mr. Fryer. Although she described hitting Mr. Fryer as a "bump" or "thud", Ms. Massey agreed that the sound of her vehicle striking Mr. Fryer was loud and that it startled her. She also agreed that it was loud enough for neighbours to hear the impact and come out of their houses.
- [35] She stated that she did not travel very far down the road before stopping her car and parking it. She testified she did not move her car after she parked it. Ms. Massey testified that she found part of her car on the ground and then found "a person on the ground."
- [36] When asked whether she could have seen Mr. Fryer had she been paying attention, Ms. Massey replied, "I suppose so". She explained that she "wasn't looking for someone" to be traveling on the right-hand side of the roadway where the streetlights were located. Ms. Massey confirmed that she was aware that, because 10th Ave is a residential street, it was important for her to be vigilant about pedestrians who may be on the road.
- [37] Ms. Massey recalled speaking with a gentleman who stopped at the scene, but did not know who he was or the details of their conversation. She also did not recall the details of her conversation with Mr. Fryer at the scene.
- [38] As a result of the Accident, the passenger's side mirror was ripped off of Ms. Massey's car. She did not take photographs of the damage to her vehicle. She kept the vehicle but did not repair it following the Accident; she gave up driving after this Accident.
- [39] During her direct examination, Ms. Massey testified that she currently suffers from wet macular degeneration, sees double and has cataracts developing. She testified that she thought her vision problems started "around" two years before the trial, after the Accident. At the trial, Ms. Massey had some difficulty seeing the exhibits placed before her; accordingly, the exhibits were enlarged so that she could see them better. There was no

evidence before the court that Ms. Massey was having issues with her vision at the time the Accident occurred.

- [40] Ms. Massey was insistent that she did not travel 150 feet after the Accident before stopping and that she "just pulled off" and stopped shortly after she heard the "bump", stating that she stopped only about six feet from where Mr. Fryer landed.
- [41] Ms. Massey testified that she did not know Mr. Fryer prior to the Accident. She testified that when he said "Hi Marilyn", she thought it was a different person. It was put to Ms. Massey on cross-examination, that Mr. Fryer said to her at the scene of the Accident, "You hit me with your car", and that she responded, "I didn't hit you with my car, I hit you with my bumper." Ms. Massey testified that she recalled speaking to Mr. Fryer but did not remember their conversation. When it was put to Ms. Massey that Mr. Hascarl was present during this exchange and that he in turn responded to Ms. Massey saying, "Your bumper is part of your car," Ms. Massey agreed that he corrected her. She also agreed that she could not challenge that this conversation took place because she could not remember it.

2. Evidence of Mr. Hascarl

- [42] Mr. Hascarl testified that on the night of the Accident, he was driving to his home on 10th Ave. He explained this is a family neighbourhood close to local schools, a park, the municipal campground, a ball diamond, and a corner store nearby. He testified that 10th Ave is a very popular roadway used by walkers, scooter riders, roller-bladers, bikers, and kids playing road hockey. On cross-examination, Mr. Hascarl confirmed it is not unusual to see children out on the road in the evening. His own kids walk along 10th Ave to the corner store and have done so in the evenings as late as 8:30 p.m.
- [43] Mr. Hascarl testified that 10th Ave is a flat, straight, paved road, wide enough for two vehicles, with no lane markings or sidewalks. There are homes on either side of the road, some with grass lawns that come right up to the pavement and some with dirt/gravel next to the pavement. He believed the speed limit in the area to be 50 km/h. He said there are street lights along the west or right side of the road.
- [44] Mr. Hascarl testified that on the night of the Accident, he had turned left onto 10th Ave from Highway 23. The roads were bare. As he turned the corner, he saw something on the ground and three people standing by it. A car had stopped approximately 50 feet from where the people were standing. He testified that he was traveling about 30 km/h and was approximately 200 meters away when he saw something laying on the ground. His sightline was straight and he could see a long way down the road with his headlights illuminated. As Mr. Hascarl approached the scene, he saw that the "something" on the ground was a person laying on the pavement. The person's body was laying partly on the pavement and partly in the dirt on the side of the road; the shoulders were laying on the pavement and the rest of his body was in the dirt.

- [45] Mr. Hascarl stopped his vehicle to see what was going on. He blocked traffic with his vehicle, approached the scene, told the two onlookers to call 911, and began administering First Aid treatment to Mr. Fryer. He grabbed blankets from his vehicle to keep Mr. Fryer warm until the ambulance arrived.
- [46] As he waited for the ambulance to arrive, Mr. Hascarl was standing by Ms. Massey and Mr. Fryer. He heard Mr. Fryer yelling "you hit me with your car", and Ms. Massey respond, "I didn't hit you with my car, I hit you with my bumper." Mr. Hascarl in turn responded "that is part of the car."
- [47] Mr. Hascarl estimates he was at the scene for approximately five to ten minutes until the ambulance arrived. He could not recall what Mr. Fryer was wearing, what time it was, or whether there were any snowbanks along the side of the road.
- [48] I also found Mr. Hascarl to be an honest and reliable witness.

3. Constable Pisio

- [49] Cst. Pisio was the RCMP officer dispatched to the Accident as a result of the call received from the ambulance services. He testified that the Accident occurred on 10th Ave, just north of the intersection with 6th Street NW, next to a white residential house. He arrived at the scene shortly before 9:00 p.m. and was not on the scene for very long.
- [50] When Cst. Pisio arrived, the ambulance service attendants were already treating Mr. Fryer, who was laying on the shoulder of the paved road. Because Mr. Fryer was receiving treatment, he went to speak to Ms. Massey, but Ms. Massey declined to speak with him.
- [51] Cst. Pisio took a few photographs of Ms. Massey's car but no photos of the front or sides of her car were introduced into evidence. Cst. Pisio stated that only two photographs of the rear of Ms. Massey's car "turned out", which he attributed to the fact that it was a "very dark night." He testified that Ms. Massey's vehicle was parked below a street light approximately 50 feet south of where Mr. Fryer lay on the ground.
- [52] Cst. Pisio described 10th Ave as a two-way straight and flat street, with no road markings. He testified that 10th Ave is a well walked road. He said there were street lights at the intersection of Highway 23 and 10th Ave and at 10th Ave and 6th Street NW. The speed limit is 50 km/h in the area.
- [53] Cst. Pisio testified that he observed no physical evidence of skid marks, brakes, tire marks, or footsteps at the scene. The side view mirror that had broken off Ms. Massey's vehicle was by Mr. Fryer.
- [54] Cst. Pisio did not speak to anyone else who was at the scene of the Accident. He did not recall anyone else at the scene aside from Mr. Fryer, Ms. Massey and the ambulance attendants. He did not interview Mr. Hascarl.

- [55] Cst. Pisio explained that he usually types up a report at the scene, but in this case, he returned to the detachment and wrote his report. The next day, he attended the hospital and obtained a recorded statement from Mr. Fryer that lasted about eight minutes. Of note, what Cst. Pisio could not have known is that staff at the Arrow Lakes Hospital had failed to diagnose Mr. Fryer's serious leg fracture; consequently, his pain was not properly managed or controlled until he was sent to Kootenay Boundary Regional Hospital ("KBRH") in Trail the following day. Cst. Pisio confirmed that he did not ask Mr. Fryer if he was on any pain medication when he gave his statement.
- [56] Cst. Pisio made an audio-recording of a portion but not all of his interview with Mr. Fryer. I agree with counsel for Mr. Fryer that, at points during the recorded conversation, Cst. Pisio does not permit Mr. Fryer to complete the answers to his questions, although I am sure this was inadvertent. I also agree that Mr. Fryer was audibly fatigued during the conversation. Indeed, in the 24 hours following the Accident, although x-rays were taken of Mr. Fryer's injuries, his tibial fracture was not properly diagnosed or treated. As a consequence he was allowed to place weight on his fractured leg. Mr. Fryer testified that after Cst. Pisio turned off the tape-recorder, the two men kept talking. Cst. Pisio did not deny this was the case. In any event, Mr. Fryer's evidence on direct and cross was consistent with what he said in the audio-recorded statement.
- [57] The defence re-called Cst. Pisio to inquire about the content of any further discussions with Mr. Fryer after the tape recorder was turned off. He testified that he most likely did have such a conversation but did not recall its contents. He did not recall Mr. Fryer telling him that he flew up onto the windshield after he was struck by Ms. Massey. He testified that he would have "absolutely" put that in his report had it been said and would have investigated this had it been said. On cross-examination, Cst. Pisio admitted he cut-off Mr. Fryer several times during Mr. Fryer's statement, that Mr. Fryer did mention the windshield, but that he was cut off, and there was no further inquiry into this issue by Cst. Pisio. Cst. Pisio admitted he did not ask Mr. Fryer anything further about the windshield. There are no photos of the front or front passenger side of Ms. Massey's vehicle.
- [58] Cst. Pisio confirmed he did not speak to anyone else at the scene and did not remember anyone else at the scene aside from Mr. Fryer, Ms. Massey and the ambulance attendants.

C. Post-Accident

- [59] Keshia Wildeman is a paramedic who treated Mr. Fryer at the scene of the Accident. She gave evidence that she "vaguely" recalls the Accident and does not recall specific details. She has attended hundreds of emergency calls since the Accident. She confirmed ambulance services were en-route to the scene at 8:53 p.m.
- [60] Ms. Wildeman completed a "BCEHS form" in relation to the Accident and confirmed these forms are completed at the scene, "on the fly". At the Arrow Lakes Hospital, Mr. Fryer had images taken of his leg. Initially, hospital staff missed the diagnosis of his orthopedic

fractures. He had pain at the base of his skull, bruising on his left hip, and pain in his left leg and back. Mr. Fryer recalls how he "hurt on the left hand side" and describing how he was very bruised from being struck. He testified that his pain was not under control at Arrow Lakes Hospital, like it was in Vancouver when he had his back surgery previously. At that time Mr. Fryer was not being treated for fractures in his leg and back that had not yet been diagnosed. Dr. Mongar, a resident at the Emergency Department of the Arrow Lakes Hospital on the night of the Accident, testified that he treated Mr. Fryer and ordered x-rays of Mr. Fryer to see if he had fractures of his spine and leg that were not diagnosed initially.

- [61] The next day, Mr. Fryer was transported to KBRH in Trail. A further review of the imaging at KBRH revealed a left knee lateral tibial plateau fracture, and also T9 and T10 compression fractures of the vertebrae in Mr. Fryer's spine. These diagnoses were missed at the Arrow Lakes Hospital. Mr. Fryer had an open reduction and internal fixation with bone grafting to repair his tibial fracture. The T9 and T10 fractures to his vertebrae did not require surgery.
- [62] In the first week of his stay at KBRH, Mr. Fryer was confused and in a tremendous amount of pain. Ultimately, his pain was managed with medication and Mr. Fryer felt it was under control. On March 27, 2018, Mr. Fryer was transferred back to Arrow Lakes Hospital to continue his convalescence. It was a slow recovery and he was limited in his ability to manage independently. He was sore at the base of his skull, his left leg and his back. Every morning, Mr. Fryer experienced painful headaches. The pain from these headaches was in the front of his head was not like the "migraine-type pain" he previously experienced. While at Arrow Lakes Hospital, his pain medication was changed. He felt "it was out of control." Mr. Fryer remained in the hospital for four weeks until his hospital bed was needed by other patients. He did not feel he was ready to leave.
- [63] On April 20, 2018, Mr. Fryer was discharged from the hospital to the Selkirk Inn Motel in Nakusp. The Selkirk Inn was the only "facility" available to house Mr. Fryer and, while far from ideal as a place of rehabilitation, Mr. Fryer was put there as a community patient, where he remained until 2020.
- [64] Ms. Michelle Stace, an occupational therapist, testified that it was her suggestion that Mr. Fryer stay at the Selkirk Inn because it was all she could find for him. Mr. Fryer was not able to return home because of the extent of his injuries and his need for continued assistance and rehabilitation. In addition, his log cabin was not wheelchair accessible. The Selkirk Inn was also chosen because it was across the street from the Arrow and Slocan Lakes Community Services building. The defence took issue with the expense of placing Mr. Fryer at the Selkirk Inn; however, it was not Mr. Fryer's wish to stay at the Selkirk Inn. Rather, this was an arrangement that was made for him and he was very clear how "miserable and uncomfortable" he was there.
- [65] Mr. Fryer describes his time at the Selkirk Inn as "awful" and that living there "was hell". He had one room, a bathroom, a microwave, and a window that faced an alley. He had no refrigerator, cooking facilities or laundry facilities. He did his laundry in a little sink. He said

it was like prison for him. He recalled the whole situation as "very stressful". He did not have a microwave in his own home and so did not know how to use the one in his room properly; there was an incident where he put tinfoil in the microwave at the motel, not realizing the danger of doing so. He could not cook for himself. His friend, who owned a restaurant across the street, would bring him food. Mr. Fryer later learned that his friend stopped getting paid by ICBC, and so she could no longer prepare meals for him. Mr. Fryer testified that he tried to drive while he was at the Selkirk Inn but: "I was afraid of the traffic I only did it a couple of times". Mr. Fryer explained he had "a hard time getting back into the car" and that he was "scared to death of traffic." He acknowledged driving after the Accident but explained his Ford Explorer needs repairs and it is off the road.

[66] Mr. Fryer longed to return to his cabin in the forest near Burton. He was unable to return to his home or his daughter's house in Nakusp not only because her home could not accommodate a wheelchair but because he required assistance she could not provide. Mr. Fryer struggled with the simple tasks of daily living. He had headaches which were unlike the migraines he suffered before the Accident. These post-accident headaches were brought on by thinking or trying to concentrate. He also noticed his short-term memory was not as good. He was also at risk of putting himself in dangerous situations and required ongoing monitoring and assistance. To compound matters, the Selkirk Inn did not adequately accommodate his wheelchair as it had a steep ramp from the parking lot level to the interior lobby and his room. Mr. Fryer was afraid of taking his manual wheelchair to the parking lot for fear of being struck.

1. Initial Treatment

[67] Mr. Fryer's medical care was overseen by Donna Gibbons, a Nurse Practitioner. Ms. Gibbons was unable to testify at this trial due to medical reasons.

[68] Upon discharge from the Arrow Lakes Hospital, Mr. Fryer was assigned to a Mr. Cameron Gordon, who was a Men's Outreach Worker with the Arrow and Slocan Lakes Community Services. Mr. Gordon assisted Mr. Fryer with day-to-day living arrangements and support. Mr. Gordon recalls that he went to see Mr. Fryer every day as he was "distressed" and "suffering greatly." Unfortunately, in the summer of 2018, Mr. Gordon suffered a heart attack; he was not replaced during his absence. With Mr. Gordon's unexpected absence, Mr. Fryer lost a friend and his primary "on-the-ground" contact while living at the Selkirk Inn.

2. Other Assistance

[69] The provision of services through Arrow and Slocan Lakes Community Services were limited because Mr. Fryer was not living at home and his situation did not fit within the confines of their program. Mr. Fryer testified that especially during his first six months at the Selkirk Inn, his pain level was not properly managed. Notwithstanding this set back, Mr. Fryer was highly motivated to get better. His goal was to get walking and move back home as soon as possible.

- [70] Despite the unsatisfactory nature of his living situation, Mr. Fryer received some rehabilitation services including some mental health support, personal care, assistance, meal provision, physiotherapy, and occupational therapy.
- [71] On May 4, 2018, Mr. Fryer saw an occupational therapist. On June 8, 2018, Mr. Fryer began working with a community rehabilitation assistant, who was supposed to assist him with his physiotherapy regime and facilitate the occupational therapist's recommendations. Unfortunately, Mr. Fryer was very disappointed with the quality of her assistance, noting that most of her time was spent dealing with issues with Mr. Fryer's phone such that she did not follow through with her other tasks. Their relationship ended when he found she had opened his mail. Mr. Fryer received physiotherapy with Mary Freebairn through August 2018. Mr. Fryer attended acupuncture session in 2018 and 2019.
- [72] To help manage his pain symptoms, Mr. Fryer took over the counter Tylenol, Advil, Gabapentin, Flexeril, Cyclobenzaprine, and Zopiclone. At times, he was not able to take his medication as he could not afford it and the cost was not covered by ICBC.
- [73] The days, weeks and months that followed Mr. Fryer's placement at the Selkirk Inn were patently very difficult for him. He explained that he was experiencing ongoing orthopedic pain, headaches, poor memory, reduced concentration, vision problems, cognitive and physical fatigue, sleep disruption, and anxiety. I found Mr. Fryer's evidence regarding his time at the Selkirk Inn reliable and compelling.
3. Mr. Fryer's Continued Efforts to Rehabilitate
- [74] Mr. Fryer's rehabilitation was lengthy. He resided at the Selkirk Inn for two and a half years. He testified that during this time he was worried about how he could look after himself or get back to his home. He describes how he was slowly getting better physically, but that he was not functioning well mentally.
- [75] While in his wheelchair at the Selkirk Inn, Mr. Fryer's mobility was very limited. When the parking lot was not busy, he wheeled around to keep up his upper body strength. He describes being "scared to death of traffic" and was "stuck" using the parking lot of the Selkirk Inn to get around in his wheelchair. .
- [76] Mr. Fryer explained that while at the Selkirk Inn, he had to learn to walk again. By the spring of 2019, he was actively using a walker along the waterfront path in Nakusp. This was the focus of his physical therapy. There were no cars on the pathway and he felt safe there.
- [77] While at the Selkirk Inn, Mr. Fryer was also worried about the state of his home in Burton. He made arrangements to return home to inspect it. He found his lawn had become overgrown and his place "looked abandoned". He was worried about mice and moisture. He was intent to get his home and property ready for his return. This was not easy to do, because his mobility and strength were impaired and he felt his ability to think and problem solve was not as good as it used to be.

- [78] In the fall of 2019, Mr. Gordon recovered from his heart attack, and he began to provide some assistance to Mr. Fryer once again. Mr. Gordon testified that Mr. Fryer was not actually assigned to his caseload but he felt compelled to assist him. His assistance was nonetheless limited because he was essentially helping Mr. Fryer outside his employment mandate. Mr. Gordon noted that Mr. Fryer's home had to be assessed before Mr. Fryer could return.
- [79] Ms. Ruggiero is an occupational therapist who first met Mr. Fryer at the Selkirk Inn. She recommended a neuropsychological evaluation and made a number of other recommendations in May 2018. A neuropsychological assessment was performed by Dr. Ann Pirolli, after which Ms. Ruggiero was reinstated as Mr. Fryer's occupational therapist. On June 5, 2019, Ms. Ruggiero made recommendations to facilitate the objective of returning Mr. Fryer to his home. She confirmed on direct examination that she did not follow up to ensure her recommendations were implemented. Her involvement in Mr. Fryer's care ended in June 2019.
- [80] Mr. Fryer's continuity of care and access to services in the Nakusp area through 2019 and into the COVID-19 pandemic in 2020 was less than exemplary. Nevertheless, he persevered. Mr. Gordon testified that in the fall of 2020, he realized Mr. Fryer needed firewood and so he arranged for volunteers to go to Mr. Fryer's home to chop and stack wood. Mr. Fryer's daughter also assisted by visiting during the week with her children and providing meals to her father.

4. Current Condition of Mr. Fryer's Injuries

- [81] After Mr. Fryer returned home in August of 2020, he continued to struggle with his physical, cognitive and mental health, and he does so to this day.
- [82] Mr. Fryer testified that he experiences continuing pain and "knots" in his mid-back "when he does anything." Sometimes the pain is so bad that it is hard for him to breathe. He has difficulty standing or sitting for longer than five to ten minutes as this causes low back and pelvic pain. This was apparent at trial during his testimony.
- [83] Mr. Fryer has pain in his low back and pelvis and sometimes his back pain is so bad he is "almost in tears." Mr. Fryer also experiences pain in his left knee when he is active. He occasionally has problems keeping his balance and "topples over."
- [84] Mr. Fryer has noticed that he can no longer multi-task like he did before the Accident and that he becomes easily confused. He explained that he used to be a good handyman and "used to fix things", such as equipment and machinery, but now, because of his current cognitive limitations, he "can't fix anything," and "can't put it together."

- [85] In addition to his physical limitations, Mr. Fryer testified that he can no longer chop wood, boat, fish, hunt or Quad. He feels these things are too complicated and unsafe for him now because of his cognitive impairments such as lack of concentration and inability to think as clearly as he once did. He also has difficulty cooking for himself and relies on food his daughter brings to him or food replacement beverages.
- [86] While Mr. Fryer recognizes he needs assistance as a result of the Accident, he very much wants to live in his home. He was very clear that this is where he and his wife built their life and raised their family and that he will do everything he can to make his life work there.
- [87] Mr. Fryer's daughter, Ms. Meadow Fryer, testified at trial. I found her to be an honest witness with a consistent and reliable recollection of events before and after the Accident. Her evidence about Mr. Fryer's pre-Accident abilities and hobbies was consistent with all aspects of Mr. Fryer's evidence. For example, she recalled that even after her father's back condition deteriorated but before the surgery and before the Accident, he was self-sufficient and had learned to live with his back problem. Ms. Fryer did not mince words, noting that he was very bent over. She recalled her father's back condition deteriorated gradually due to a degenerative disc. Nevertheless, she recalls that his balance was steady and that she had no concerns about his independence or his ability to concentrate or organize the tasks of daily living. Ms. Fryer describes her father as a "tinkerer" who enjoyed working on motors. He organized and attended own appointments, looked after his dog and his own needs; he did not need her support. He enjoyed watching movies, participating in his grandchildren's activities, going to their hockey and soccer games, and going swimming with the family at the beach.
- [88] Ms. Fryer recalls that after his back surgery, her father recovered very well. She describes how happy he was to stand up straight and to be living a more normal life. Their plan was that he would stay at her home until the winter was over. She testified that he was able to take care of himself and it was good to have him in her home. She recalls he was doing well emotionally, mentally and physically. He was helping his grandchildren with their homework and was looking forward to returning home, chopping his own firewood and taking care of his home.
- [89] Ms. Fryer testified that after the Accident, her father was in a great deal of pain and very uncomfortable. He was not only physically disabled but felt devastated that all the work he put into recovering from his back surgery was lost. She testified that he still cannot take care of himself or his home without assistance. While he has difficulty sitting and standing due to back and knee pain, Ms. Fryer is most concerned about his mental impairment. She described how he has "no sense of direction", and can no longer get to appointments or get groceries on his own. His handwriting has changed. Mr. Gordon's evidence was very similar. He said that Mr. Fryer "definitely needs help" and is struggling. He also testified that Mr. Fryer seemed "befuddled." He was of the view that a neurological assessment was in order.

- [90] The evidence before me establishes that Mr. Fryer continues to struggle with daily pain in his back and left knee, that he did not experience after the surgery and before the Accident. At times the pain in his back is intense. He is also very frustrated and has a sense of loss because of his cognitive challenges and limitations, which also arose for the first time after the Accident. He continues to suffer from anxiety, and with the reality of not being able to do what he could do before the Accident. The headaches at the front of his head are not as frequent now but he still gets them when he "thinks hard or concentrates" such as when he tries "to get through [his] post office stuff."
- [91] Mr. Fryer struggles with everyday tasks at home such as cooking and cleaning. However, he testified he "will do everything [he] can do to fight to stay in [his] home." He says he does his exercises and physiotherapy. He is asking for the support of a counsellor to deal with his anxiety.
- [92] Mr. Fryer's current medications include Gabapentin, Flexeril, Celebrex, and Zopiclone for sleeping and pain.

D. Expert Evidence

- [93] Four experts were tendered by counsel for Mr. Fryer: 1) Dr. Pirolli provided neuropsychological assessments; 2) Dr. Spivak provided a psychiatric assessment; 3) Ms. Wendi Wright provided a cost of future care assessment; and 4) Ms. Clark, an economist, provided the present value of costs of future care. The defendant did not tender any expert evidence.
1. Dr. Ann Pirolli
- [94] Dr. Pirolli was qualified as a neuropsychologist. She performed multiple assessments of Mr. Fryer. She assessed Mr. Fryer on August 14, September 10 and September 20, 2018, and she prepared an expert report on October 10, 2018 regarding her findings. Dr. Pirolli also conducted a follow-up assessment of Mr. Fryer on September 30, October 2 and October 8, 2020. Her findings and conclusions in regard to this latest assessment are summarized in her report of October 16, 2020, along with her recommendations. I found Dr. Pirolli to be an impartial, clear, well-informed and very impressive expert witness. Her testimony was of considerable assistance to the Court.
- [95] Dr. Pirolli opined that Mr. Fryer "suffers from cognitive deficits primarily in the realm of executive function" which have most likely arisen as a result of the Accident. She notes that the start of these problems was temporally related to the Accident and they "most likely represent the sequelae of a moderate traumatic brain injury."
- [96] Dr. Pirolli acknowledged in her report that the ambulance crew and hospital information suggests there were no impairments from a global neurological basis immediately after the Accident. However, three days after the Accident, Mr. Fryer's daughter noted that Mr. Fryer appeared confused and sound sensitive. When Dr. Pirolli first interviewed Mr. Fryer after the

Accident she found he was "so tangential" that it was a challenge to obtain the information she needed, commenting that "he was not tracking." She found that his cognitive impairment did not improve overall and over time, and that he remains cognitively impaired.

- [97] Dr. Pirolli concluded that Mr. Fryer has lasting cognitive difficulties relating to a number of cognitive functions such as comprehending complex information, multi-tasking, forgetfulness, poor self-monitoring and self-awareness. He has difficulty providing accurate details, difficulty describing abstract concepts, and demonstrates disorganization and poor sequencing of his thoughts. Dr. Pirolli acknowledged on cross-examination that pain medication could have contributed to Mr. Fryer's confusion but opined that medication would not have been the main cause of his confusion.
- [98] Dr. Pirolli also found that Mr. Fryer's speed of processing information and organizational skills have been impaired. Indeed, she explained that her normal testing battery had to be truncated because of Mr. Fryer's "significantly slow pace, verbosity and difficulty reading". He also showed difficulties with visual-constructive planning. She noted that Mr. Fryer tends to get "stuck" on the same topic and tends to ramble "on and on". He would start telling a story, would stop and get quiet; he would then apologize but could not stop himself. Dr. Pirolli noted Mr. Fryer had difficulties writing out his name and has a decreased sense of time. He shows a lack awareness of dangers. The only mild cognitive impairment was his working memory.
- [99] This is not to suggest that Mr. Fryer is entirely cognitively disabled. Dr. Pirolli found that, on tasks involving verbal abstract reasoning, visually oriented problem-solving and verbal fluency, Mr. Fryer performed in the average to superior ranges.
- [100] Dr. Pirolli made a number of recommendations including that he receive assistance with home management, including cleaning and the preparation of meals as well as yard care. She also recommended that Mr. Fryer be referred to a neurologist, a nutritionist, and an occupational therapist to assess his capacity to manage his mail and bills.
- [101] Dr. Pirolli stated that Mr. Fryer "will require another neuropsychological assessment as he ages in order to monitor his cognitive capabilities." She opined that he is now at a higher risk for early cognitive decline given his traumatic brain injury. She also concludes that, given the amount of time that has elapsed since the Accident, Mr. Fryer "is not likely to make further major recovery with respect to his neuropsychological presentation."

2. Dr. Mitchell Spivak

- [102] Dr. Spivak was qualified as a psychiatrist. He assessed Mr. Fryer on March 10, 2021 and rendered his report on March 21, 2021. The defendant did not take issue with his report.
- [103] Dr. Spivak noted Mr. Fryer has no history of mental illness or significant cognitive issues before the Accident. The evidence before the Court also did not indicate any such history.

[104] Dr. Spivak opined that as a result of the Accident, Mr. Fryer suffered a traumatic brain injury of mild to moderate severity. Dr. Spivak also found that Mr. Fryer has symptoms suggestive of post-traumatic stress disorder ("PTSD"). However, in his opinion, Mr. Fryer does not meet full criteria for this diagnosis. Dr. Spivak concluded that Mr. Fryer "still continues to struggle with anxiety related to certain circumstances and occasional flashbacks of prior trauma." Accordingly, he opines that the "most appropriate diagnosis to capture these symptoms would be one of an unspecified trauma- and stressor-related disorder."

[105] Dr. Spivak noted that the most significant impairment for Mr. Fryer "from a psychiatric/psychological perspective has been the significant neurocognitive changes he has experienced." He noted that he considered whether Mr. Fryer was suffering from dementia but dismissed this hypothesis. He acknowledged and accepted Dr. Pirolli's findings that Mr. Fryer's cognitive impairment was caused by the Accident. He notes that Mr. Fryer's "overall quality of life has been dramatically impacted with his being unable to engage in most activities he used to look after without effort." Dr. Spivak adds:

Mr. Fryer's posttraumatic stress disorder-like symptoms limit his mobility further. While I suspect he is already significantly limited by his physical issues, the added psychological burden of being unable to walk on a country road without fear further confines him and limits his overall scope of functioning.

[106] Dr. Spivak also opined: "Mr. Fryer's prognosis as far as his injuries sustained in the accident, is guarded." He also opined that he did not expect there would be a significant recovery in his cognitive functioning. He also opined that Mr. Fryer's anxiety about being on a road will likely be chronic and that the likelihood of improvement is limited.

3. Wendi Wright, MOT

[107] Ms. Wright was qualified an occupational therapist, and presented as a very experienced, articulate and balanced witness. She assessed Mr. Fryer at his home in Burton on October 5, 2020, and on October 29, 2020 prepared a report that addressed his cost of future care. After receiving Dr. Spivak's report, she also prepared an addendum report dated April 7, 2021. Ms. Wright provided recommendations for Mr. Fryer's future care needs related to the injuries he sustained in the Accident. The defence did not tender its own occupational therapist or submit a rebuttal report.

[108] Ms. Wright visited Mr. Fryer's home, interviewed him and developed a cost of future care and a life care plan. She conducted physical effort testing, which showed that Mr. Fryer was making full effort. On direct examination, Ms. Wright explained that Mr. Fryer demonstrated disorganized thinking and that she could not use the functional pain scale because of his presentation, inability to comprehend and disorganized thinking. For example, just filling out a consent form took well over an hour. As a result, Ms. Wright was not able to perform a formal capacity evaluation, which would have required that Mr. Fryer fill out various forms or questionnaires. Accordingly, Ms. Wright modified her assessment

methods and testing techniques in order to assess Mr. Fryer's situation and develop his care plan.

- [109] Ms. Wright reported that, "during testing, Mr. Fryer's functional abilities and limitations matched with his diagnoses; this finding increased confidence in the reliability of his subjective reports of impairments." She also reported that during his distraction-based testing, Mr. Fryer's functional presentation did not change, and inconsistencies were not noted.
- [110] Ms. Wright found that Mr. Fryer demonstrated limitations in his ability to lift, carry, sit, and stand. He is also limited in his ability to perform many medium and heavy homemaking tasks due to difficulty with stooping, bending, low-level work and above-shoulder work. He is further limited in his ability to perform yard work and home maintenance tasks, as well as repetitive upper body/trunk movements. Ms. Wright noted that Mr. Fryer may have difficulty with tasks that have a safety component, such as driving, using a chainsaw, driving a Quad, and climbing ladders.
- [111] Ms. Wright opined that Mr. Fryer has not reached a functional plateau and that with ongoing rehabilitation, there may still be some improvement in his function to a degree, especially if the therapy happens within the context of his home environment where he is motivated to return to his responsibilities. On cross-examination, Ms. Wright explained her opinion further, stating that while Mr. Fryer may see some functional improvement through ongoing rehabilitation, this improvement is not expected to reduce his care needs.
- [112] On direct examination, Ms. Wright explained that the care items she recommends are based on her own observations of Mr. Fryer's cognitive dysfunction, as well as other experts' opinions, medical records, and her own professional and clinical experience. On cross-examination, Ms. Wright confirmed that her recommendations are not solely based on Mr. Fryer's self-reports; she looked at the "complete picture".
- [113] For Mr. Fryer's future care needs, Ms. Wright provides the costs for medical interventions, including a neurology assessment, neuropsychology assessment, psychological counselling, physiotherapy, occupational therapy, driving assessment, nutrition/dietitian assessment and follow up, housekeeping assistance, home maintenance assistance, yard maintenance assistance, firewood processing, snow removal assistance, assistance aids or devices, medications, and travel costs to attend various appointments and services. In her addendum report, she provides the costs for personal home care or assisted living services. Ms. Wright's recommendations are based on results of her own assessment and the recommendations of other experts. I will address these later in these reasons.
- [114] Mr. Fryer told the Court his new nurse practitioner has arranged for him to see a neurologist in Kelowna, but that he is on a waiting list for this. Both Ms. Wright and Dr. Pirolli recommended that he see a neurologist.

4. Christiane Clark

[115] Ms. Clark was qualified as an economist. She prepared two reports regarding: a) the present value of the costs of future care, dated November 4, 2020; and b) an updated report, dated April 9, 2021. Ms. Clark was not required to attend trial for cross-examination. Her reports were accepted as read.

III. Liability

[116] In this case, I must assess whether and to what extent Ms. Massey and Mr. Fryer met their respective duties and obligations as users of the road. Both the Motor Vehicle Act, R.S.B.C. 1996, c. 318, and the common law inform the duties and obligations of the parties in this case. That is, the standard of care is informed by both the reasonableness of the parties' actions and by the rules of the road: *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21; *Kilian v. Valentin*, 2012 BCSC 1434 at para. 28. I address each below.

[117] Given the factual matrix before me, ss. 144, 179, 180, 181, and 182 of the Motor Vehicle Act are most instructive. While these provisions do not set out an exclusive code relating to the prudent course of conduct for motorists, they do supplement the common law duty to exercise due care: see *Hmaied v. Wilkinson*, 2010 BCSC 1074 at para. 21.

[118] The defendant asserts that Mr. Fryer is entirely liable for the Accident. She relies on ss. 144 and 179-182 of the Motor Vehicle Act, which provide in part:

Careless driving prohibited

144(1) A person must not drive a motor vehicle on a highway

- (a) without due care and attention,
 - (b) without reasonable consideration for other persons using the highway, or
 - (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.
- (2) A person who contravenes subsection (1) (a) or (b) is liable on conviction to a fine of not less than \$100 and, subject to this minimum fine, section 4 of the Offence Act applies.

Rights of way between vehicle and pedestrian

179(1) Subject to section 180, the driver of a vehicle must yield the right of way to a pedestrian where traffic control signals are not in place or not in operation when the pedestrian is crossing the highway in a crosswalk and the pedestrian is on the half of the highway on which the vehicle is travelling, or is approaching so closely from the other half of the highway that he or she is in danger.

- (2) A pedestrian must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close it is impracticable for the driver to yield the right of way.

- (3) If a vehicle is slowing down or stopped at a crosswalk or at an intersection to permit a pedestrian to cross the highway, the driver of a vehicle approaching from the rear must not overtake and pass the vehicle that is slowing down or stopped.

Crossing at other than crosswalk

180 When a pedestrian is crossing a highway at a point not in a crosswalk, the pedestrian must yield the right of way to a vehicle.

Duty of driver

181 Despite sections 178, 179 and 180, a driver of a vehicle must

- (a) exercise due care to avoid colliding with a pedestrian who is on the highway,
- (b) give warning by sounding the horn of the vehicle when necessary, and
- (c) observe proper precaution on observing a child or apparently confused or incapacitated person on the highway.

Pedestrians using highways

182(1) If there is a sidewalk that is reasonably passable on either or both sides of a highway, a pedestrian must not use a roadway.

- (2) If there is no sidewalk, a pedestrian using a highway must use only the extreme left side of the roadway or the shoulder of the highway, facing traffic approaching from the opposite direction.
- (3) A person must not be on a roadway to solicit a ride, employment or business from an occupant of a vehicle.
- (4) Except for a person who solicits a ride in an emergency situation, a person who contravenes this section commits an offence.

[119] Counsel for the defendant submit that by virtue of ss. 179(2), 180 and 182, Ms. Massey had the right of way when the Accident occurred, relying on the decisions in *Larsen v. Doe*, 2010 BCSC 333 at paras. 17-18, and *Jones v. Dillistone*, 2021 BCSC 580 at para. 29, among others. Counsel underscore that the standard of care required of drivers in responding to pedestrian-created hazards is not one of perfection but rather of reasonable prudence in all the circumstances.

[120] Having considered these provisions of the Motor Vehicle Act and the defendant's able submissions, I am of the view that Ms. Massey was nonetheless negligent, and is liable for the Accident. I find that Ms. Massey was not exercising due care and attention and acted without reasonable consideration for other users of the road when she struck Mr. Fryer. I am satisfied that Mr. Fryer was there to be seen. In the moments before he was struck, he had his headlamp turned on and was walking on the side of the road that was lit by street lights. While he turned his headlamp off just before the Accident, he did so because he was

about to turn and wave (as was his practice), and he did not want his headlamp (which he held in his hand) to blind the driver that was passing by. He was wearing a white, albeit faded bandana, and good walking shoes. The evidence of all parties was that it was a clear night and there was no fog or rain. Ms. Massey herself acknowledged that her sightline was at least a few hundred metres as she was travelling on 10th Ave before she struck Mr. Fryer. Mr. Hascarl also testified that when he was travelling down 10th Ave his sightline was straight and he could see a long way down the road with his headlights illuminated. He was able to see Mr. Fryer lying on the ground, partly on the road and partly on the dirt on the side of the road. As noted earlier in these reasons, when it was put to Ms. Massey that Mr. Fryer was there to be seen, she candidly responded: "I suppose so." I find that had Ms. Massey been exercising due care and attention, she would have seen Mr. Fryer in her sightline well before she struck him.

- [121] While the defendant relies on s. 179(2) of the Motor Vehicle Act, I find it is of limited materiality in this case. The evidence does not support the conclusion that Mr. Fryer stepped into the path of Ms. Massey's vehicle such that it was impracticable for Ms. Massey to accommodate his path of travel. Indeed, the evidence of Ms. Massey was that as she was driving down 10th Ave before the Accident, she was drawn to a light on the left side of the road and then veered to the right and struck Mr. Fryer. The irregular movement along the road was that of Ms. Massey, not Mr. Fryer.
- [122] Mr. Fryer was walking on the far edge of the roadway where it was the safest to walk given the debris and uneven surface of the area to the right of the roadway. In this light, s. 180 of the Motor Vehicle Act is not applicable, as Mr. Fryer was not crossing the road when he was struck.
- [123] Subsections 181(a) and (b) of the Motor Vehicle Act are, however, of assistance. Ms. Massey did not exercise care to avoid colliding with Mr. Fryer, nor did she give warning by sounding her horn.
- [124] The common law is also of assistance in this regard; in *Stewart v. Dueck*, 2012 BCSC 1729, Justice Dardi ably summarizes the applicable principles that inform the nature and scope of the obligations placed on motorists by the common law:
- [38] The authorities establish that all motorists have an overarching common law duty to exercise what constitutes, in all the circumstances, reasonable and due care. All motorists have a general duty to keep a proper look-out and to take reasonable precautions in response to apparent potential hazards: *Hmaied v. Wilkinson*, 2010 BCSC 1074 at para. 23.
- [40] The Court's task is to determine whether each of the parties in an accident met their common law duties of care. The analysis of the standard of care, which is relevant to the particular circumstances, is informed by both the reasonableness of the parties' actions and by the rules of the road; *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21; *Kilian v. Valentin*, 2012 BCSC 1434 at para. 28.

[125] A prudent driver, in Ms. Massey's circumstances, would have been aware of their surroundings and would have seen Mr. Fryer walking along the road, rather than being surprised by the impact and not knowing that they had struck a person. Users of the road are expected to exercise reasonable care, even when others have failed to do so: see Salaam at para. 21. There is a duty upon drivers and pedestrians alike to keep a proper lookout and take reasonable precautions in response to apparent potential hazards: Hmaied at paras. 21-28. On the facts before me, I find Ms. Massey did not exercise due care and attention and in any event had a sufficient opportunity to avoid the Accident but did not take appropriate evasive action. Accordingly, I find her negligent.

A. Apportionment of Liability

[126] This conclusion, however, does not end my analysis. I must also consider whether Mr. Fryer was contributorily negligent. I find that he was to a limited degree.

[127] Section 1(1) of the Negligence Act, R.S.B.C. 1996, c. 333, provides that:

If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

[128] In the recent decision of Coffey v. Sabbaghan, 2020 BCCA 335 at para. 42, the Court clarifies and confirms that the word "fault" in s. 1(1) equates to blameworthiness.

[129] Section 182(2) of the Motor Vehicle Act, required Mr. Fryer to walk only on the extreme left side of the roadway or its shoulder, facing the traffic approaching him. He did not do so.

[130] Nevertheless, on the unique facts of this case, I find that Mr. Fryer was significantly less blameworthy than Ms. Massey. While Mr. Fryer was not following the rule of the road articulated in s. 182(2), he chose not to do so for safety reasons. What substantially mitigates Mr. Fryer's choice not to walk on the left side of the road, , was the positioning of street lights only on the right side of the road, which made pedestrians less visible on the left side of the road than on the right. Indeed, Mr. Fryer testified that other pedestrians in the area walked on the right side of the road at night. I understand why Mr. Fryer felt safer walking along the right side of the road where it was lit by street lights: he was relying on the street lights for his safety. I also accept Mr. Fryer's evidence that he could not walk on the shoulder of the road and was walking on its far-right edge because the shoulder was littered with debris such as branches, and the ground was uneven. He was also holding his head lamp to ensure he could see the far-right lip of the road so that he would not stumble while walking. He was also wearing his white bandana.

[131] These factors notwithstanding, it is a well-known rule of the road that pedestrians must walk against oncoming traffic. I find that in the circumstances, Mr. Fryer's choice to walk with oncoming traffic was a relatively minor breach of the standard of care, but a breach nonetheless. In light of all the evidence, Ms. Massey's inattention is a far greater departure from the standard of care than that of Mr. Fryer and is therefore far more blameworthy. I find that Mr. Fryer is 10% contributorily negligent.

IV. Causation

[132] A plaintiff like Mr. Fryer has the onus of establishing on a balance of probabilities that defendant's negligence caused or materially contributed to his injuries. To be compensable, a defendant's negligence need not be the sole cause of the injury as long as it is a cause, and the cause is not nominal or falls outside the de minimis range. Nor is it necessary that causation be proved with scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9; *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.

[133] In *T.W.N.A. v. Canada* (Ministry of Indian Affairs), 2003 BCCA 670, our Court of Appeal reasoned, at para. 22, that once causation has been proven, the tortfeasor is fully liable for the damage caused by his or her wrongful conduct even when pre-existing conditions or physical vulnerabilities existed prior to the accident. However, the Court also reasoned that different considerations apply when assessing damages. I will return to this point later in these reasons when I assess the appropriate quantum of damages.

[134] I am satisfied on the whole of the evidence before me, including that of Mr. Fryer, Ms. Fryer, Dr. Pirolli and Dr. Spivak, that the Accident caused Mr. Fryer's current cognitive impairments as described earlier in these reasons. The expert evidence of Dr. Pirolli and Dr. Spivak was compelling, and when aligned with that of the lay witnesses, established the necessary causal connection between Mr. Fryer's cognitive impairments and the Accident. I also find that the expert and lay evidence set out above supports the conclusion that Mr. Fryer suffered a traumatic brain injury as a result of the Accident of mild to moderate severity.

[135] In addition, the totality of the evidence before me, establishes, on a balance of probabilities, that Mr. Fryer suffered a fractured spine (at T9 and T10), fractured leg (tibia), headaches, an injured knee and a foot injury as a result of the Accident. The evidence also establishes that Mr. Fryer continues to suffer from these injuries with the exception that his foot injury has resolved and his headaches are not as frequent.

[136] While Mr. Fryer may have been more physically vulnerable given his life-altering surgery five months before the Accident, there is no doubt that the Accident itself caused him significant injury and pain. As noted in *Blackwater v. Plint*, 2005 SCC 58 at para. 78, as long as the defendant's act of negligence is a cause of the plaintiff's damage, the defendant is fully liable for the damage. Tortfeasors must take their victims as they find them, even in

circumstances where the plaintiff's injuries are more severe than they would be for a person without the same pre-existing physical vulnerabilities as the plaintiff. This principle is often referred to in the case law as the "thin skull" rule.

- [137] Mr. Fryer also notes that he suffers headaches when he needs to concentrate on a task, and distinguishes these types of headaches from the migraine headaches he previously suffered. In addition, he also suffers anxiety and fear of being struck again by a car, as well as problems with keeping his balance, as a result of the Accident.

V. Damages

- [138] As Mr. Fryer was retired at the time of the Accident, I need not assess any past or future loss of income earning capacity. He claims non-pecuniary damages, the cost of future care, loss of housekeeping capacity, and special damages.

- [139] It is axiomatic that a key first principle underpinning the proper assessment of a damages is, so far as is possible, to put a plaintiff in the position he or she would have been absent the defendant's negligence. In properly assessing damages, the Court is mindful of considering both the pre-accident and post-accident circumstances of the plaintiff, as articulated in the following, often cited passage in *Athey* at para. 32:

The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss. In the cases referred to above, the intervening event was unrelated to the tort and therefore affected the plaintiff's "original position". The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.

- [140] As noted above, tortfeasors must take their victims as they find them. However, a defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced in any event, and in the absence of the defendant's negligence; this principle is referred to as the "crumbling skull" rule: *Athey* at paras. 32-35; *Blackwater* at para. 78.

- [141] Where it is necessary to assess hypothetical or future events, such as how Mr. Fryer's life would have proceeded in the absence of the defendant's negligence, it is well settled that the standard of proof is not the balance of probabilities but, rather, whether there is a real and substantial possibility that an event will occur. Accordingly, a future possibility may be properly taken into consideration by the Court where it "is a real and substantial possibility and not mere speculation": *Athey* at para. 27. This analysis is to be distinguished from assessing past events, which must be proven on a balance of probabilities. Once proven, such past events are "treated as certainties": *Athey* at para. 28.

[142] Where it is established that a future or hypothetical event is a real and substantial possibility and not mere speculation, it is to be given weight according to its relative likelihood. In *Athey*, the court provides the following example, at para. 27:

if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation : *Schrump v. Koot* (1977), 18 O.R. (2d) 337 (C.A.)

[143] In *Dornan v. Silva*, 2021 BCCA 228, our Court of Appeal cast further light on the distinction between a real and substantial possibility and one that is "mere speculation." Grauer J.A. reasons at para. 63 that a risk that is a real and substantial possibility, and not mere speculation, "is a risk that is measurable". Put differently, risks that are real and substantial are not speculative if they are measurable.

[144] At para. 93, Grauer J.A. also reasons that once it is established that a contingency or risk is a real and substantial possibility, the trial judge must then assess its relative likelihood. Furthermore, he affirms that the court's assessment of positive or negative contingencies, which are specific to the circumstances of the plaintiff, must be grounded in the evidence before the trial judge. At para. 92, he relies on the following passage in *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.):

47. If a plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility

[emphasis added]

[145] In *Lo v. Vos*, 2021 BCCA 421 at para. 39, the Court clearly stated that the onus of establishing a real and substantial possibility is on the party asserting it.

[146] Accordingly, once a court concludes that there is a real and substantial possibility of a future event and it is in the process of assessing its relative likelihood, a party must be able to point to the evidence before the court which supports the contingency in question. Further, in reaching its conclusion, the court must ground its reasons and conclusion on the contingency's relative likelihood having regard to that evidence. Justice Grauer reasons:

[134] There is no doubt that the task of the trial judge in circumstances such as these is not easy. By definition, we are dealing with possibilities, and there is no one right answer. But the law provides one right process, which, of course, must be tethered to the evidence, not to averages and approximations based on imprecise evidence.

[147] This jurisprudence, has informed my assessment of the various heads of damages, as discussed below.

A. Non-pecuniary Damages

[148] Non-pecuniary damages are intended to compensate plaintiffs for their past and future pain, suffering, disability, and loss of enjoyment of life: *Javorovic v. Booth*, 2021 BCSC 336 at para. 54. In determining non-pecuniary damages, each case must be assessed based on the particular facts before the court: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189. When making that assessment, the following factors delineated in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, are key considerations:

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[149] Further, as noted by the Court of Appeal in *Moskaleva v. Laurie*, 2009 BCCA 260 at para. 95, the amount of the non-pecuniary award should compensate for more than just direct injuries:

[95] The underlying purpose of non-pecuniary damages is to "make life more endurable" and should be seen as compensating for more than just a plaintiff's direct injuries [citations omitted]. In *Lindal*, at 637, Dickson J. for the Court emphasized that the quantum of an award is determined through a functional approach and should not necessarily correlate with the gravity of the injury:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury". In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case".

[150] Accordingly, the amount of an award for non-pecuniary damages should not depend only on the seriousness of the injury but also upon its ability to ameliorate the condition of the victim in light of their particular situation. An appreciation of the individual's particular loss is key and the award will vary in each case "to meet the specific circumstances of the individual case".

[151] I have examined each of the factors in *Stapley* and our Court of Appeal's functional analysis in *Moskaleva* in light of the circumstances of this case. Furthermore, I have considered the authorities relied upon by both parties, giving due consideration to what guidance they offer and their relative comparability to the facts before me, keeping in mind that the compensation awarded must be fair to both parties.

[152] In doing so, I have assessed the nature and scope of the injuries Mr. Fryer has suffered as a result of the Accident. I have also considered how his health, recreational and social capacities, and general lifestyle have been impaired as a result of the Accident. I have also provided an allowance for Mr. Fryer's loss of capacity to perform housekeeping tasks as a result of his Accident-related injuries: *Kim v. Lin*, 2018 BCCA 77 at para. 33; *Riley v. Ritsco*, 2018 BCCA 366 at para. 100.

[153] While it is clear Mr. Fryer had a serious pre-existing back condition prior to the Accident, the evidence before me established that he also underwent a life-altering and successful back surgery, which corrected his deformity and eliminated his previous functional disabilities. The evidence established that after his back surgery, Mr. Fryer could stand-up straight for the first time in years, he was self-sufficient, his back "felt great." His spirits were lifted and he was able to do much more than what he could do immediately prior to his surgery.

[154] Tragically, the evidence before me established that the Accident severely injured Mr. Fryer, such that he is no longer self-sufficient, is cognitively impaired and is physically disabled to a more serious extent than he was not only before the Accident but also before his surgery.

- [155] He suffered a mild-moderate traumatic brain injury, cognitive impairment and significant orthopedic injuries. He spent a month in the hospital and was placed in the Selkirk Inn for further support and rehabilitation. I accept Mr. Fryer's evidence that despite his extensive efforts to improve and rehabilitate, he is no longer able to comfortably walk or sit, cook for himself, or enjoy the outdoor activities that he is so passionate about, such as hunting and fishing, or going for long walks.
- [156] I accept that his ongoing back pain is so severe at times that he finds it difficult to breathe. His level of back pain is significantly more severe now than the back pain he experienced in the days before the Accident. His pain level had steadily diminished after the surgery and before the Accident to the point that it was no longer incapacitating, as it is now.
- [157] In addition, I find that Mr. Fryer's cognitive impairment as a result of the Accident also interferes with his mental functioning and self-sufficiency. As a result, his ability to repair machinery and "tinker" with various projects around his home, as he did prior to the Accident, is impaired. I also find that he continues to struggle with anxiety and fear about being struck while walking along the road. Each of these injuries and symptoms were not present before the Accident.
- [158] Despite suffering with a serious back condition before his back surgery, Mr. Fryer was nevertheless independent and was responsible for his self-care. Before his surgery he still enjoyed fishing and hunting, albeit to a more limited degree than he had in years past. He was not cognitively impaired. Before his surgery, he drove to the grocery store and purchased his own groceries, cooked his own meals, went fishing, went to the beach and even hunted with a special licence. He did repairs on his truck. I find that he is in a worse physical and mental state now, than he was not only in the days before the Accident, but also before his back surgery.
- [159] I accept Mr. Fryer's evidence that the surgery gave him a "new life", that it was a success, that he felt much better than before the surgery, and that he was enjoying several kilometre walks before he was struck down by the defendant. Ms. Fryer corroborated this evidence and no contrary evidence was tendered by the defence.
- [160] I accept Ms. Fryer's evidence that her father was a joy to have around her home after the back surgery, that he was able to care for himself and was helping his grandchildren with their homework, and that the Accident occurred just at the point when they were waiting for the snow to melt so Mr. Fryer could return to his cabin near Burton. The evidence before me established that Mr. Fryer was by nature an active outdoorsman in the years before the Accident; indeed, as noted earlier, even before his back surgery he hunted and fished despite his physical limitations.

- [161] I find that given the success of his back surgery and Mr. Fryer's love of the outdoors, there is a real and substantial possibility that he would have resumed his outdoor activities such as hunting and fishing, had the Accident not occurred. Furthermore, I find a very high likelihood of him doing so had he not been so seriously and cognitively impaired by the Accident. Accordingly, I have considered these losses of function, lifestyle and activity in setting his award for pain and suffering.
- [162] Mr. Fryer seeks non-pecuniary damages of \$300,000. His counsel cites a number of authorities including: *Ho v. Ip*, 2019 BCSC 2220; *Tompkins v. Bruce*, 2012 BCSC 266; *Zachery v. Prescesky*, 2019 BCSC 500; and *Jones v. Colonna*, 2021 BCSC 1175. Counsel for the defendant asserts that non-pecuniary damages should fall within the range of \$75,000 to \$125,000 and relies on the following authorities: *William v. Ross*, 2017 BCSC 2200; *Zhang v. Graham*, 2014 BCSC 1578; *Lariviere v. Martins*, 2013 BCSC 1751; and *Tenhunen v. Tenhunen*, 2015 BCSC 26.
- [163] I am of the view that the authorities advanced by counsel for Mr. Fryer, although somewhat distinguishable, are much more aligned with my findings of fact than those relied upon by the defence.
- [164] In three of the decisions relied on by the defendant (*William*, *Lariviere*, and *Tenhunen*), the plaintiff did not sustain a brain injury. In *Zhang*, one of the plaintiff's more significant injuries was to the knee, but the award was apparently impacted by the fact that he had a pre-existing degenerative condition in his knee: at para. 30.
- [165] Two of the plaintiff's decisions are not analogous. In *Zachery*, the plaintiff was far younger and the fact that his social life and career had been adversely impacted weighed heavily in the award. In *Tompkins*, the award was impacted by the fact that the plaintiff's head injuries caused depression and irritability, which ultimately ruined his pre-accident romantic relationship; he was also still working and forced to change trades as a result of the accident.
- [166] *Jones* and *Ho* are perhaps closer analogues to the facts at bar. In *Ho*, the plaintiff (retired and unmarried like Mr. Fryer) was older, but he suffered a similar complex of injuries to Mr. Fryer, though his physical injuries were more serious. In *Jones*, the plaintiff was similar in age to Mr. Fryer and had similar symptoms. Post-accident, his spine was fused at an angle, impacting his ability to walk his property, something he had taken pleasure in prior to the accident.
- [167] Case law can be a helpful guide, but each case must turn on its own facts. Considering the entirety of the facts before me, I am of the view that an award of \$265,000 is appropriate in this case.

1. Negative and Positive Contingencies

- [168] Counsel for the defendant assert that Mr. Fryer's pre-existing back symptoms would cause him difficulties in the future, even if the Accident had not occurred. However, the evidence before me is that Mr. Fryer's back surgery was a success and that it addressed his spinal deformity, including the dysfunction and pain it caused. The defendant did not adduce evidence to the contrary. I am simply not able to conclude that there is a real and substantial possibility that Mr. Fryer's back condition would cause him difficulties in the future. The defence was free to tender expert evidence or other evidence to support this hypothesis as a real and substantial possibility. I find it did not meet this threshold.
- [169] I have also considered whether, notwithstanding his successful back surgery, the injuries caused to Mr. Fryer's back and leg from the Accident would cause his current physical condition to deteriorate in the future. Evidence was not led by Mr. Fryer on this hypothetical and I am unable to conclude, having reviewed the evidentiary matrix, that I can find a real and substantial possibility of this occurring. Therefore, no contingency increase in nonpecuniary damages is warranted.
- [170] Each of these hypothetical outcomes are scenarios where expert evidence from either party would have been of great assistance to the Court. As the Court reasoned in *Lo* at para. 39, the onus of establishing such possibilities is on the party asserting them. Put differently, the defence bears the burden of showing that there is a real and substantial possibility that Mr. Fryer's back condition will deteriorate as a result of a pre-existing condition, or that it will improve with time. Likewise, the plaintiff bears the onus of showing there is a real and substantial possibility that his back condition will deteriorate over time as a result of the Accident. Having reviewed the evidentiary matrix, these hypotheticals remain in the realm of speculation, are not sufficiently grounded in the lay or expert evidence, and are not measurable. They do not meet the threshold of a real and substantial possibility.
- [171] I should note that the defendant relies tangentially on the report of Ms. Wright, who refers in her report to medical documents that in turn refer to Mr. Fryer's pre-accident medical history including a diagnosis of degenerative disc disease. However, no expert was tendered to be cross-examined on these pre-accident documents and as such the opinions embedded within them cannot be relied upon by the defendant as proper opinion evidence. The case law regarding the use of hearsay in expert reports is well-established: "hearsay referred to by an expert will be admissible, but only for the limited purpose of evaluating the opinion, not as proof of its facts": *Mazur v. Lucas*, 2010 BCCA 473 at para. 37. In this case, there is no expert report regarding Mr. Fryer's pre-existing physical condition.
- [172] I have also specifically considered whether there is a real and substantial possibility that Mr. Fryer's physical injuries are likely to improve in the future. The defendant asserts that in the absence of expert evidence regarding the plaintiff's prognosis regarding his back injuries, I am unable to draw conclusions in this regard. There is no question that expert evidence speaking directly to the issue of whether the physical injuries are permanent would have been helpful. That being said, there is direct evidence of Mr. Fryer's symptoms, his rate of recovery over time, and his condition at the time of trial. I am satisfied that this

Court may consider the evidence as a whole and assess whether there is a real and substantial possibility that Mr. Fryer's injuries are likely to stay the same, improve or deteriorate: see *Athey* at para. 27.

- [173] In light of the evidence in its totality, I find that there is a real and substantial possibility, and a very high likelihood, that Mr. Fryer's current physical condition will not improve to any degree that would warrant a contingency deduction. In so concluding, I have considered that Mr. Fryer's physical symptoms have not improved since he left the Selkirk Inn in 2020 and returned to his home in Burton. Also, in October 2020, when Ms. Wright assessed Mr. Fryer, he complained of mid-back pain, low back pain/pelvic pain, left knee pain, headaches and cognitive issues. These are the very same symptoms Mr. Fryer testified at trial that he continued to experience. I am also mindful of the evidence of Ms. Wright who opined that while Mr. Fryer "may" still note some improvements in his function, especially if the therapy happens "within the context of his home." Not only this statement tentative and qualified, but she also opined that any improvement was not expected to reduce Mr. Fryer's care needs. In this light I am unable to conclude there is a real and substantial possibility that Mr. Fryer's level of functioning will improve to a measurable degree or, alternatively that the relative likelihood of improvement would be anything beyond the *de minimis* range. In the final analysis his physical condition is now, and very likely will continue to be poor. He will need considerable assistance.
- [174] Dealing next with Mr. Fryer's cognitive impairment. Based on the uncontroverted evidence of both Dr. Pirollo and Dr. Spivak, I am satisfied that as a result of the Accident, Mr. Fryer suffered lasting cognitive impairments. Further, the evidence does not support a real and substantial possibility that his cognitive impairment will improve. I address this point in greater detail later in these reasons in my cost of future care analysis.

B. Cost of Future Care

- [175] The test for determining the appropriate award for cost of future care is an objective one based on the evidence and on costs reasonably and medically necessary to restore plaintiffs to their pre-Accident condition, insofar as possible: *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30. Such costs must also be reasonable in the sense that they are costs the plaintiff will likely incur: *O'Connell v. Yung*, 2012 BCCA 57 at para. 68. Each case must be determined based on its own unique circumstances.
- [176] The plaintiff submits that the following items, recommended by Ms. Wright in her occupational therapy report dated October 29, 2020, are costs of care that are medically justified and likely to be incurred:
1. Further medical interventions (neurology referral and further neuropsychological assessment);

2. Rehabilitative services including psychological counselling, physiotherapy, occupational therapy, a driving assessment, and consultation with a dietician;
3. Homemaking assistance including housekeeping services, maintenance and "handyperson" services, yard maintenance, firewood processing, and snow removal;
4. Assistive devices/aids; and
5. Medications.

[177] Before addressing the suggested costs individually, I will state my findings generally at the outset. Mr. Fryer testified that if the care recommendations are funded, he would pursue them. He emphasized repeatedly that he very much wants to remain at home. He wants to remain there until he dies, if at all possible. I am of the view that the proper approach, particularly in this case, is to allow Mr. Fryer to remain in his home for as long as reasonably possible. Of course, such an outcome will depend on favourable safety and health considerations.

[178] Putting aside the question of what may or may not happen in the future, and keeping in mind that the cost of care must be tied to the results of the Accident, I am satisfied on the evidence before me that each of the recommendations for care set out in the Ms. Wright's expert report dated October 29, 2020 are reasonable and should be implemented immediately. Each are medically justified given his current state of health and in light of my factual findings regarding the injuries he suffered from the Accident and his continuing symptoms. Furthermore, he has committed to implementing Ms. Wright's recommendations once he receives the financial support to do so.

[179] I will address the recommendations in Ms. Wright's follow-up report regarding personal home care and assisted living at the end of this section.

1. Further Medical interventions

[180] Staff at Arrow Lakes Hospital in Nakusp stated medical services are limited in their community, and their residents travel to larger centres for specialized medical services. Mr. Fryer has travelled to Kelowna in the past for medical care and treatment.

[181] Ms. Wright recommends, given Mr. Fryer's state of health, that he be accompanied on medical visits. She estimates the cost of a round trip for one medical visit for two people, including mileage (i.e., 416 kilometres to Central Kelowna), meals and accommodation, to cost a "low" of \$664.38 and a "high" of \$867.04.

a) Neurologist

[182] Dr. Pirolli recommends that Mr. Fryer be referred to a neurologist. This cost will be covered by MSP but travel cost will be incurred, as noted above.

[183] Mr. Fryer was on the waitlist for a neurological assessment at the time of trial. Based on Ms. Wright's estimated cost range, Ms. Clark calculates the present value of the travel cost at \$653-\$852. I am of the view that the sum of \$852 is medically justified and likely to be incurred.

b) Neuropsychological Assessment

[184] Dr. Pirolli also recommends another neuropsychological assessment to monitor Mr. Fryer's cognitive capabilities. The cost of this assessment is between \$3,000 and \$3,500 and would take between two and four days depending on client needs.

[185] Because Mr. Fryer would be expected to arrive the day before the assessment and leave the day after, travel costs would be based on four to six days and three to five nights, depending on the provider chosen. Ms. Wright estimates travel cost would be an additional \$1298.26 to \$2045.44.

[186] In light of Dr. Pirolli's prognosis and Mr. Fryer's commitment to take good care of himself, I find there is a real and substantial possibility that Mr. Fryer will need a follow-up with this assessment and that it will very likely occur. Ms. Clark lists the range of present value costs, with travel, at \$4,226-\$6,337. Counsel for Mr. Fryer submits the median amount of \$5,281 will be acceptable. This is a reasonable amount and I so order.

2. Rehabilitative Recommendations

a) Psychological Treatment

[187] Dr. Pirolli found that Mr. Fryer continues to suffer from anxiety and fear as a result of being struck by the defendant's car and recommended psychological treatment. Mr. Fryer testified he needed help in this regard and specifically asked for counselling support. Ms. Wright recommends an initial psychological treatment block of 25-35 sessions and estimates this would cost between \$4,759 and \$7,000. If this treatment could happen virtually the cost of travel would be nil. If in-person sessions were required the travel cost would be \$11,169.20.

[188] Counsel for Mr. Fryer notes that Ms. Clark calculates the present value range (based on Ms. Wright's cost estimates for an initial treatment block) to be between \$4,600 and \$17,865 and submit that the sum of \$9,340 is a reasonable cost of care for this service. I do not agree. I find the evidence does not ground a real and substantial possibility that Mr. Fryer will need psychological counselling beyond the initial 25-35 session treatment block. Based on the evidence, I find that the sum \$6,000 is a reasonable and medically justified cost of care for Mr. Fryer's psychological counseling needs, and one that is likely to be incurred. However, Mr. Fryer has driven somewhat since the Accident, and his anxiety has not prevented him from driving altogether. Further, and Ms. Wright was not able to determine whether further counselling sessions will be needed beyond the original block of counselling. As such, I am unable to find that there is a real and substantial possibility that Mr. Fryer will need additional counselling beyond the initial block of 25-35 sessions.

b) Physiotherapy

- [189] Ms. Wright recommends physiotherapy for Mr. Fryer's back and knee. She recommends 12-16 sessions for the provision of appropriate exercises to improve spinal and knee mobility. She estimates that an initial physiotherapy treatment block will cost between \$840 and \$1,120.
- [190] Based on Ms. Wright's cost of care for an initial round of physiotherapy of 12-16 sessions, Ms. Clark calculates the present value range from \$825-\$1,101. Counsel for the plaintiff submits that an additional allocation for three more blocks is required. I have no difficulty concluding, based on Ms. Wright's recommendation and the extent of Mr. Fryer's injuries that an initial block of 16 sessions is warranted. Accordingly, I find that the future cost of care in this regard should be set at \$1,101. The question of whether there is a real and substantial possibility that Mr. Fryer will require additional physiotherapy is difficult to discern given the paucity of evidence before me on this point and falls within the realm of speculation and cannot be measured. Ms. Wright herself was unable to do so. As I am unable to conclude that a real and substantial possibility exists that additional blocks of treatment are necessary, the cost of care for physiotherapy is set at \$1,101.

c) Occupational Therapy

- [191] Dr. Pirolli notes that Mr. Fryer lives a fairly solitary existence and expressed concern that there were "no occupational therapy functional evaluations of his abilities, needs and safety within [his own] environment." Dr. Pirolli recommends that, given Mr. Fryer's "cognitive presentation, self-report of leaving pots on the stove, supposed cluttered environment, balance issues and visual difficulties", this functional evaluation occur "as soon as possible." Based on her observation of Mr. Fryer, Ms. Wright concurs with Dr. Pirolli that a functional assessment should be done that focused on Mr. Fryer's "executive functions, and limitations relating to same."
- [192] Ms. Wright estimates that the costs of such a functional assessment will range from \$840 to \$1,000 and the cost of travel will range from \$475 to \$548.
- [193] Ms. Wright also observes that "Mr. Fryer has demonstrated resiliency and motivation to remain at his home." She recommends he would benefit from occupational therapy education related to symptom management such as, among other things, utilizing task modification and aids, adopting pacing/planning and task prioritization, and using "compensatory strategies for cognitive deficits."
- [194] Ms. Wright recommends that the occupational therapist also provide an activation program including community integration since Mr. Fryer "is at a high risk of social isolation due to his ongoing symptoms and the rural location of his home."

[195] Ms. Wright recommends 24-48 hours of occupational therapy time and estimates the cost to be between \$2,880 and \$6,000, plus a travel cost of \$5,700 to \$13,161.60. She also recommends 48-96 hours of rehabilitation assistant support and estimates the cost to be \$2,640 - \$6,048, plus travel costs of \$3,390.60 to \$13,563.84

[196] Based on Ms. Wright's estimates, Ms. Clark calculates the present value range for cognitive based occupational therapy, that involves a functional assessment, symptom management, and an "activation" program (with travel costs) to be in the range of: \$15,660 (through Creative Therapy Consultants) to \$38,953 (through Meridian Rehabilitation Consulting). Ms. Wright works for Creative Consulting and is very familiar with his case. I find that the lower cost of \$15,660 is reasonable and appropriate; it is not only fairer to the defendant but will provide Mr. Fryer with well-informed expert care.

d) Driving Assessment

[197] Ms. Wright notes that during her home visit Mr. Fryer reported driving familiar and short distances such as between Burton and Nakusp, although he needs to stop to take a break due to pain. Dr. Pirolli recommended that Mr. Fryer be assessed as he may lack awareness of his driving limitations. Ms. Wright concurred and recommends that Mr. Fryer receive a driving assessment. Ms. Fryer also expressed concern about her father driving.

[198] Ms. Wright estimates the cost of a driving assessment from Meridian Rehabilitation Consulting in Vernon will be \$1,150 and that the cost of travel to be between \$854.40 and \$1,028.40.

[199] The present value of the driving assessment as calculated by Ms. Clark based on Ms. Wright's estimates is within the range of \$1,972-\$2,143. I am in agreement with counsel for Mr. Fryer that the amount of \$2,000 meets the requisite cost of care legal test and is a reasonable amount.

e) Nutritionist/Dietician

[200] Ms. Wright notes that Mr. Fryer reported eating one meal a day despite having several cupboards full of non-perishable goods. She opines that Mr. Fryer would benefit from receiving education related to nutrients he requires.

[201] Ms. Wright notes that there is a free HealthLinkBC 811 telehealth program which is covered by MSP and is offered over the telephone. Clients may access dietician support and book one-on-one sessions with their clinicians free of charge. Alternatively, there are private nutritionists that provide private nutritional support virtually for the cost of \$125 per month.

[202] Accordingly, Ms. Wright estimates the cost range of one month of nutritional support is between nil and \$125, depending on which option Mr. Fryer chooses. This cost of care was not pursued at trial. In any event, it is clear that nutritional support can be obtained free of charge. Accordingly, there will be no associated cost of care award for nutritional support.

3. Services

a) Housekeeping Assistance

- [203] Ms. Wright reports that based on her observations, while touring Mr. Fryer's home, that "it is clear that he has difficulty performing many of his daily cleaning tasks and he has reduced his living area, as well as his standards of living to accommodate his limitations." She notes that Mr. Fryer demonstrated difficulty with tasks requiring low-level and above-shoulder work. He also had difficulty with stooping and bending as well as handling items beyond 20-30 lbs "on an occasional basis" which she opined indicates he will require assistance with many of his medium to heavier housekeeping tasks such as vacuuming and mopping floors, cleaning the bathtub and cleaning out cupboards. Seasonal cleaning tasks such as washing walls, baseboards and windows are also problematic for Mr. Fryer.
- [204] Ms. Wright recommends Mr. Fryer be provided with 8-12 hours of seasonal cleaning during the autumn/winter for deep cleaning as well as the organization and removal of items he has not been able to address since returning home. She estimates the initial cost will be \$235.20 to \$378 (at \$29.40 to \$31.50 per hour). The annual cost of seasonal cleaning is estimated to be \$352.80 to \$504.
- [205] In addition, she recommends Mr. Fryer be provided with three to four hours of cleaning assistance once every two to three weeks to perform the tasks he is not able to conduct with pacing and task modification, such as vacuuming and mopping the floor, dusting high and low surfaces, changing bed linens and cleaning the bathroom. She estimates the annual cost will be \$1,499.40 to \$3,276.
- [206] Ms. Wright recommended an initial deep clean of Mr. Fryer's home, which at a present value ranges from \$231-\$372. The annual seasonal and regular housekeeping assistance is costed out at \$1,853-\$3,780. Using Ms. Clark's multiplier of 9.506 to age 80, as set out in her April 9, 2021 report, the present value of housekeeping would range from \$17,607-\$35,932. Counsel for Mr. Fryer submits that the present value of his reasonable housekeeping costs to age 80 is \$35,932.
- [207] In regard to Mr. Fryer's future, counsel for Mr. Fryer submits that in light of his current condition, his care needs, his age and the medical opinions of Dr. Pirolli and Dr. Spivak, it is likely he will be able to live in his home until he is about 80 years old; they submit that there is a very reasonable possibility that Mr. Fryer will need to transition into an assisted living home at that time.
- [208] As described earlier in these reasons, Dr. Pirolli opined that Mr. Fryer may be at risk of further cognitive impairment in the future as a result of his concussion. Similarly Dr. Spivak concurred with Dr. Pirolli's cognitive assessments and opined that he "did not expect there to be significant recovery in his cognitive functioning" and added that Mr. Fryer may need some form of supervised living arrangement in the future. As such, I find there is a real and substantial possibility that Mr. Fryer may suffer further cognitive decline in the

future as a result of the Accident.

[209] While clearly difficult to assess, having considered the nature and scope of Mr. Fryer's injuries, including my findings above and the expert opinions of Dr. Pirolli and Dr. Spivak, I am of the view that there is a real and substantial possibility and it is most likely that Mr. Fryer will remain in his home, with care and assistance (as set out herein) until the age of 80. However, I am also of the view that by age 80 there is a real and substantial possibility, as well as a high likelihood that he will need to move into some form of assisted living due as a result of further cognitive decline, as articulated by Dr. Pirolli.

[210] Accordingly, the present value range of \$17,607-\$35,932 is a good starting point to assess the present value cost of seasonal and regular housekeeping. Notably, counsel for the defendant does not take issue with housekeeping costs as a necessary cost of future care. It is clearly needed and I am satisfied that Mr. Fryer will welcome and use this assistance. Having considered the matter, I find that the sum of \$35,932 is an appropriate present value award for housekeeping costs.

b) Home Maintenance Assistance

[211] Ms. Wright noted that Mr. Fryer's house, while well-built, has fallen into a state of disrepair. It is unclear on the evidence before me what repair work needed to be done before the Accident, although Mr. Fryer testified the water pump needed to be fixed and that storms had left debris on his property. He and Mr. Cameron did attend his home on a couple of occasions while he was at the Selkirk Inn; however, he planned to return home to attend to both his house and yard maintenance after he had recovered from his surgery, before the Accident.

[212] Mr. Fryer reports not being able to do many of the medium to heavy home maintenance chores he typically would do, which is consistent with Ms. Wright's functional assessment. Accordingly, Ms. Wright recommends 30-40 hours of handyman services over the course of a couple of weeks to repair the water pump, leaks, etc. She also recommends he be provided with 20-30 hours per year of handyman service related to the ongoing maintenance tasks such as repairing equipment, outbuildings, fencing, the roof, etc. Ms. Wright opines, consistent with her functional assessment and the evidence of Dr. Pirolli, that these are tasks he is not able to perform due to his pain, compromised balance and strength, and his cognitive impairment.

[213] Ms. Wright estimates that the initial cost of home maintenance assistance is within the range of \$882 to \$2,940. She estimates the annual cost range for subsequent home maintenance assistance to be \$599.00 to \$2,205.

[214] Ms. Wright was not able to determine the estimated cost range for travel fees related to home maintenance.

[215] Accepting Ms. Wright's estimated costs, the present value of an initial and single year of home maintenance ranges from \$867-\$2,891. The present value costs thereafter range from \$5,589-\$20,960 using Ms. Clark's multiplier to age 80. I am satisfied that there is a real and substantial possibility that these costs will be incurred and that the likelihood is high that this cost will be incurred at the higher end of the range such that the total sum of \$23,851 is a fair and reasonable present value given the research and care Ms. Wright put into her estimates.

c) Yard Maintenance Assistance

[216] The Accident has also impeded Mr. Fryer's ability to perform yard work due to his level of pain, poor balance and cognitive impairment. Ms. Wright opined that her assessment also indicates that he is "limited for repetitive upper body/trunk movements, such as pruning tree branches due to pain in his mid-back (between his shoulder blades)."

[217] Ms. Wright recommends one hour of regular weekly yard maintenance with an estimated cost of \$29.40. She also recommend an hour of seasonal yard maintenance with an estimated cost of \$36.75-\$39.90. Ms. Wright estimates the annual cost of regular yard maintenance assistance to be \$1,528.80 and an annual cost of seasonal yard maintenance assistance to be between \$441 and \$638.40.

[218] The present values for the yard maintenance costs are \$14,532 for regular maintenance and the seasonal costs range from \$4,192 to \$6,068. I am satisfied that there is a real and substantial possibility that these costs will be incurred and that the likelihood is high that costs will be incurred at the higher end of the range provided by Ms. Wright such that the total sum of \$20,600 is a fair and reasonable present value for Mr. Fryer's yard maintenance, particularly in light of the size of his property.

d) Firewood Processing

[219] Mr. Fryer's home is heated by a wood-burning furnace. In October of 2020, when Ms. Wright visited Mr. Fryer's home, there were several piles of wood on the property. He reported that he requires approximately six cords of wood for winter. At the time of Ms. Wright's assessment, Mr. Fryer split wood "on a limited basis, using a wedge and sledgehammer - a slow, energy-consuming and pain-increasing process."

[220] Ms. Wright opines that despite her recommended rehabilitative measures, Mr. Fryer "will likely not improve to the degree that he could collect, split and stack six cords of wood while performing his essential daily tasks." Accordingly, she recommends Mr. Fryer be provided with six cords of wood each winter and that the wood be split and stacked.

[221] Ms. Wright estimates that the annual labour cost of using on-site logs for six cords of wood would range between \$882 and \$1,852.20.

[222] She also estimates that if Mr. Fryer were to purchase processed wood and have it stacked on the property the estimated cost would be between \$2,166 and \$2,196. Accordingly, the estimated cost of processed firewood ranges between \$882 and \$2,196.

[223] The present value cost of firewood processing to age 80, based on Ms. Wright's estimates, is \$8,384-\$20,875. Mr. Fryer gave evidence he sourced wood for his stove in the bush. Accordingly, I am of the view that there is a real and substantial possibility that wood will be sourced in the same manner in the future and that Mr. Fryer will only need to pay for the cost of labour to collect, split and stack the wood. The plaintiff submits that \$20,875 should be allocated to his firewood needs. I am of the view the most likely present value cost will be \$17,772 rounded to the nearest dollar (i.e., \$1,852.20 x 9.056) based on Ms. Wright's estimate of \$1,852.20.

e) Snow Removal Assistance

[224] Before the Accident, Mr. Fryer used his Quad, with a plow attachment, to clear his driveway, which is about 100-150 feet long (single lane). Ms. Wright notes that since the Accident, he experiences confusion when trying to attach the blade and so has not been able to plough his driveway himself. Ms. Wright notes that during the winter of 2019/2020 Mr. Fryer was not able to clear his driveway and was not able to leave his home for the majority of the winter.

[225] Accordingly, Ms. Wright recommends Mr. Fryer be provided with a snow removal service to reduce the risk of social isolation and the risk of Mr. Fryer injuring himself trying to use the plow.

[226] Ms. Wright estimates the annual cost of snow removal assistance is between \$840 and \$2,100 and the estimated annual cost for travel fees related to snow removal is \$735 to \$2,100.

[227] The present value cost for snow removal services to age 80, ranges from \$14,972-\$39,925. Ms. Wright noted that if Mr. Fryer were able to secure assistance from a snow removal provider in Burton the travel cost could be eliminated. Mr. Fryer has in the past been both successful and unsuccessful in having his driveway ploughed by neighbours at no charge. I find that there is a real and substantial possibility that he will be able to find someone in the Burton area to plough his driveway if paid, thereby eliminating the travel fee, and that this is more likely than not. Accordingly, I am of the view that the most likely present value cost of snow removal to age 80 is \$19,962 rounded to the nearest dollar (\$2100 x 9.506).

4. Assistive Devices/Aids

[228] Ms. Wright recommended the following aids:

- i. Lightweight and long-handled aids to reduce stooping and reaching, to assist with cleaning and garden/yard work. Items could include a long handled scrubber, duster, and standing weed/root puller. The estimated initial cost for the cleaning aids is \$100 to \$150 and for the garden tools is \$100. The estimated annual replacement for the long-handled cleaning aids is \$100 to \$150.
- ii. Commercial-Grade Therapeutic Heating Pad to assist with Mr. Fryer's self-management of back pain. A commercial-grade heating pad is recommended as it is more durable for regular use and many such pads include moist heat to improve heat transmissions into the muscles. The cost range for a heating pad is \$78.34 to \$166.82. The annual replacement cost range is \$15.67 to \$55.61 (based on a replacement of every three to five years).
- iii. Kitchen Safety Device - iGuard Stove for Mr. Fryer's safety as he has had several instances where he has walked away from the stove while cooking. Ms. Wright recommends an automatic shut-off device to reduce the associated risk of burnt food or worse. The device includes a motion detector and automatically disables the stove if the kitchen is left unattended for more than five minutes. The cost is \$765.45 and requires no replacement.

[229] The present value costs for these items ranges from \$2,528-\$3,829. The plaintiff submits \$3,829 is reasonable in the circumstances. I find that there is a real and substantial possibility not only that Mr. Fryer requires these aids and therapeutic items but that he will very likely use them. I find that the present value cost of \$3,829 is reasonable.

5. Medications

[230] Mr. Fryer's current prescriptions are for Gabapentin, Flexeril/Cyclobenzaprine, Celebrex, and Zopiclone. The annual cost for these medications ranges from \$784.75 to \$861.40 plus annual dispensing fees from \$191.84 to \$200.

[231] While Mr. Fryer stated that he does like or want to be on medication, I am satisfied that there a real and substantial possibility that Mr. Fryer will need to continue taking at least some of these medications for the rest of his life and that he is very likely to do so. The present value of his medication ranges from \$11,163-\$12,253. In light of the nature and severity of Mr. Fryer's persistent and lasting symptoms, I find that he will most likely take these medications and that a present sum value of \$8,000 is a reasonable amount for his future medication expenses.

6. Personal Home Care and Assisted Living

[232] As noted earlier in these reasons, Ms. Wright also issued an addendum report on April 7, 2021 to supplement her October 29, 2020 report. This addendum report was issued after she reviewed Dr. Spivak's independent medical report dated March 11, 2021. Ms. Wright was asked to consider whether she had further cost of future care recommendations, based on her review Dr. Spivak's report. She did.

[233] Ms. Wright agreed with Dr. Spivak's assessment regarding the potential need for Mr. Fryer to engage in a supervised living arrangement at some point in the future. She noted that such an arrangement could take several forms; for example, a family member or paid employee could move in with him and provide the support required. Alternatively, a personal care attendant could provide a daily visit to aid with meal preparation, self-care tasks, and light housekeeping. She noted, however, that many individuals requiring supervised living arrangements transition into an assisted living facility, where their homemaking tasks are performed for them and they are assisted with personal care tasks. Of course, Mr. Fryer would no longer require yard and house maintenance, house cleaning and firewood service etc. once he moved into an assisted living facility.

[234] Ms. Wright outlined the available options as follows:

- i) Public home care through the Nakusp Interior Health Authority Home and Community Care staff. Mr. Fryer may apply for these services and may be eligible for as much as 30-60 minutes of daily home care services at no cost, depending on his annual income. If Mr. Fryer does not qualify, services are available at \$39.61 per visit with no travel costs. Ms. Wright opined that in her experience, and in light of Dr. Spivak and Dr. Pirolli's reports, this service is not likely to meet Mr. Fryer's needs in the event he experiences further cognitive decline.

The estimated annual cost range is nil to \$14,457.65

- ii) Private home care through Spectrum Home and Family Care in the Nakusp/Burton area that would be tailored to Mr. Fryer's needs. The estimated annual cost for daily one-two hour visits is from \$10,220 to \$24,820.
- iii) Combined public and private home care in the circumstances where Mr. Fryer qualifies for and receives public home care service and, if and when his function declines further, receives at least an hour of supplementary private home care each day. The estimated annual cost range for combined public and private home care per day is from \$10,220 to \$26,867.65
- iv) Private company that provides full-time caregiving services in Mr. Fryer's area. There are limited options available and this service may not be available at all. The cost is determined on a case by case basis where available and Ms. Wright was not able to determine or estimate the cost.
- v) In-home employee caregiver that would be employed by Mr. Fryer. Not including overtime, Ms. Wright estimates the cost would be \$40,684.80
- vi) Assisted living accommodations and services at a staffed residence which provides a range of scheduled personal care services in the Kootenay region. The estimated annual cost is \$13,680 to \$42,000 not including the cost of relocation.

- [235] I am satisfied that daily private care home visits of one to two hours are better suited to Mr. Fryer than full-time in-home caregiving. I am also satisfied based on Mr. Fryer's current symptomology, as set out above, that such support is medically necessary and will be welcomed by Mr. Fryer. As I have previously found, I am satisfied that there is no real or substantial possibility that Mr. Fryer's physical and cognitive impairment will improve.
- [236] Ms. Wright costs out the annual expenses for private home care in the range of \$10,220 to \$24,820 for one to two hour visits. The present value calculation of this care to age 80 is \$97,170-\$235,939. I find there is a real and substantial possibility that the present value amount of \$235,939 mostly likely represents the level of home care he requires and that it will very likely be necessary until he reaches the age of 80.
- [237] It is difficult to say, for the purposes of this award, how long Mr. Fryer's costs of care should last once he moves into a residential facility at age 80. Mr. Fryer told the Court his mother is 94 years old and still independent. We do not have evidence regarding his father's lifespan and there is no expert report regarding Mr. Fryer's life expectancy. Counsel for the defence does not make a specific submission on this point. Counsel for Mr. Fryer asserts that it is reasonable to conclude Mr. Fryer will live to at least 90 years old but provides alternate calculations that utilize Mr. Fryer's statistical life expectancy, confirmed by Ms. Clark, to be 85.8 years.
- [238] Ms. Wright estimates the annual range of costs for private or public assisted living accommodations and services at \$13,680 (public) - \$42,000 (private). Using Ms. Clark's cost of care multiplier from age 80 to his statistical life expectancy of 85.8 years (multiplier of 5.314), the present value ranges for the costs of assisted living accommodation during this time period are \$72,695 - \$223,188.
- [239] If Mr. Fryer lives until the age of 90, which counsel says is probable given his mother's current status, the present value range of costs for assisted living from age 85-90 (multiplier of 2.719) total \$37,195 - \$114,198.
- [240] Counsel for the plaintiff submits that, given the evidence that there are limited options and availability in the Kootenay region for residential care, a lump sum amount should be awarded "for the future negative contingency that the plaintiff will have to move into a private assisted living facility." Counsel submits the lump sum amount should be in the range of \$337,386 ($\$223,188 + \$114,198 = \$337,386$) to ensure Mr. Fryer is appropriately compensated and cared for into the future, particularly if he declines cognitively.
- [241] Cognizant of the Court's reasoning in Dornan, Rab, and Lo, in this case, it is imperative that I ground my analysis in the best objective evidence before me. I am of the view that the assessment of Mr. Fryer's costs associated with future assisted living facilities, ought to be grounded in his statistical life expectancy of 85.8 years. In the absence of specific evidence regarding his particular life expectancy, this is the best evidence. Put differently, in light of the evidence before me I find that that there is a real and substantial possibility that Mr. Fryer's life expectancy is 85.8 years of age and the likelihood is relatively high, such that it

justifies an award for the likely costs of care incurred up until that point in time. Indeed, the evidence before me regarding Mr. Fryer's life expectancy beyond this period is speculative and cannot be properly measured or valued.

[242] Given Ms. Clark's cost of care multiplier from 80 to 85.8 years, and Ms. Wright's estimate of costs, I find that the most reasonable and appropriate award is \$72,695, based on the cost of a public facility that Mr. Fryer would likely attend given his modest lifestyle.

7. Loss of Housekeeping capacity

[243] In *Firman v. Asadi*, 2019 BCSC 270, Justice Verhoeven reasons, at para. 235, that judges have the discretion to address a claim for housekeeping capacity as part of the non-pecuniary loss or as a segregated pecuniary head of damage and relies on *Kim v. Lin*, 2018 BCCA 77 at para. 33 and *Riley v. Ritsco*, 2018 BCCA 366 at para. 100.

[244] In *Riley*, Justice Groberman reasons:

[101] I acknowledge what was said in *Kroeker* about segregated non-pecuniary awards "where the special facts of a case" warrant them. In my view, however, segregated non-pecuniary awards should be avoided in the absence of special circumstances. There is no reason to slice up a general damages award into individual components addressed to particular aspects of a plaintiff's lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.

[245] In *Firman*, Justice Verhoeven addresses the discretion of the trial judge in discerning how to address this loss, and he underscores the importance of avoiding duplication of compensation:

[236] Duplication in the award must be avoided. Where potential costs for housekeeping assistance are awarded, in the context of costs of future care, then the case for a separate pecuniary award for loss of housekeeping capacity is lessened and perhaps eliminated, depending on the specific facts of the case. In this case a minor award for housekeeping assistance has been made.

[246] With these comments in mind, and after consideration of the evidence in this case, I am not satisfied that the evidence supports a distinct pecuniary award for loss of housekeeping capacity in this case. There is no particular reason to distinguish this loss from his other limitations, which are reflected in his non-pecuniary award. This is not a case, as in *Ali v. Stacey*, 2020 BCSC 465, where the plaintiff has suffered a pecuniary loss from diminished housekeeping capacity; compensation in this vein is not warranted. In addition, he has received an award for the future cost of housekeeping assistance.

[247] In summary, I am of the view that there is a sound basis in this case to follow the same approach as Justice Verhoeven did in *Firman*. I have considered the effect of the Accident on Mr. Fryer's housekeeping functions in granting his award of non-pecuniary damages. I do not see any exceptional or other circumstances that would justify a distinct pecuniary award for loss of housekeeping capacity in this case.

C. Special Damages

- [248] An injured person is entitled to recover reasonable out-of-pocket expenses incurred as a result of the accident under the head of special damages: *Carillo v. Deschutter*, 2018 BCSC 2134 at para. 165. When assessing what constitutes a "reasonable" expense, medical justification is one, but not the only, factor; subjective factors, such as whether the plaintiff believed the treatments were necessary, can also be considered: *Redl v. Sellin*, 2013 BCSC 581 at para. 55; *MacIntosh v. Davidson*, 2013 BCSC 2264 at para. 128.
- [249] Mr. Fryer claims special damages in the amount of \$110,058.88. This amount includes expenses for: physiotherapy, acupuncture, Community Care Worker Services, occupational therapy, prescription medication, BC Ambulance Services, medical transportation, a back brace, a walker, a manual wheelchair, meals while living at the Selkirk Inn, and accommodation at the Selkirk Inn from April 20, 2018 to August 20, 2020,. The costs of food and lodging at the Selkirk Inn is what distinguishes this case from most others, and also justifies the magnitude of Mr. Fryer's special damage award.
- [250] At trial, the defendant advised the plaintiff that it agreed it would not dispute special damages relating to the cost of physiotherapy, acupuncture, occupational therapy, prescriptions, BC Ambulance Service, wheelchair and walker. These expenses total \$18,731.97.
- [251] The most significant portion of Mr. Fryer's special damages claim is clearly the cost of his accommodation and meals at the Selkirk Inn. The total cost of accommodation and meals at the Selkirk Inn was \$81,325.91 with accommodation comprising \$71,205.10 of the total. At trial, the defendant agreed that these expenses were incurred but argued that most of the costs and meals at the Selkirk Inn are not reasonable and are therefore not recoverable. Specifically, counsel argued that approximately six months after being placed at the Selkirk Inn, in approximately October or November 2018, Mr. Fryer was well enough to move back home and should have done so making the remainder of the accommodation and meal costs at the Selkirk Inn unreasonable and therefore not recoverable.
- [252] In light of the evidence before me regarding the nature and scope of Mr. Fryer's extensive injuries, including his traumatic brain injury and his cognitive impairments, I have no hesitation in concluding that Mr. Fryer was not physically or mentally able to move to his isolated cabin at the time the defendant suggests. Mr. Gordon recalls that even after his heart attack, when he returned to work with Mr. Fryer, he was concerned about him because he found Mr. Fryer was "befuddled". While the defendant denies Mr. Fryer has a

permanent cognitive impairment, I have found that he does based on uncontroverted expert opinion. I find that Mr. Fryer did not have the mental capacity or "executive" cognitive function (as Dr. Pirolli diagnosed) to orchestrate such a move before he did. He moved in at the suggestion of his occupational therapist at the time, Ms. Stace, whose involvement with him ceased not long thereafter. I find Mr. Fryer moved forward as best he could after the Accident and while at the Selkirk Inn, with relatively little assistance in the last year and a half of his stay.

[253] Mr. Fryer did return to his home in Burton to assess its state of repair while at the Selkirk Inn but he did so with the assistance and guidance of others such as Mr. Cameron and neighbours. While he eventually moved from a wheelchair to walking, the evidence of Ms. Wright makes it clear that Mr. Fryer still has difficulty walking, and even standing.

[254] In light of the entirety of the evidence before me, I am satisfied that a special damages award of \$110,058.88 is reasonable.

VI. DISPOSITION

[255] Without the 10% deduction for his contributory negligence, Mr. Fryer would be entitled to the following damages:

Item

Amount

Non- pecuniary damages:

\$265,000

Costs of future care:

\$469,474

Loss of housekeeping capacity:

\$0

Special damages:

\$110,058.88

TOTAL:

\$844,532.88

[256] Applying the 10% reduction for contributory negligence, Mr. Fryer is entitled to a total award of \$760,079.59

[257] Subject to any submissions the parties may wish to make on the question of costs, and absent any circumstances of which I am unaware, Mr. Fryer is entitled to 90% of his costs at Scale B.

"MORELLATO J."

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