

CANADA / JUDGMENT

Brooks v. Habib

2019 BCSC 1398

COURT

Supreme Court of British Columbia

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2019 BCSC 1398 Brooks v. Habib

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brooks v. Habib,

2019 BCSC 1398

Date: 20190821

Docket: M147891

Registry: Vancouver

Between:

Nicholai Brooks

Plaintiff

And

Gulalai Habib and Sadeed Habib

Defendants

Before: The Honourable Madam Justice Dardi

Reasons for Judgment

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Place and Date of Trial:

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INTRODUCTION

- [1] The plaintiff, Nicholai Brooks, alleges he was injured in a motor vehicle accident on January 5, 2013 (the "First Accident"). The defendants, Gulalai Habib and Sadeed Habib, have admitted liability for the First Accident. At issue is the assessment of Mr. Brooks' claim for damages.
- [2] Ms. Habib hit the rear end of the motor vehicle in which Mr. Brooks was a passenger. At the time of the collision Mr. Brooks' wife, Holly Vredenburg, was driving and he was sitting in the right front passenger seat. It is uncontroversial that the defendants' vehicle sustained no damage. There was minor damage to Mr. Brooks' vehicle.
- [3] Mr. Brooks and his wife moved to California in July 2013. Mr. Brooks was subsequently involved in another rear-end accident on December 5, 2013 (the "Second Accident"). There is pending litigation in California regarding the second accident. Before the Second Accident, Mr. Brooks was scheduled for cervical fusion surgery and underwent that surgery on December 19, 2013 (the "Neck Surgery"). Mr. Brooks was involved in another rear-end accident in California on March 23, 2016 (the "Third Accident"). Mr. Brooks has not pursued any legal action regarding the Third Accident and in this action, he is not seeking any compensation for any temporary aggravation he may have sustained in the Third Accident.
- [4] Mr. Brooks alleges that he suffers from chronic pain in his neck, upper back and shoulder blades as a result of the First Accident. He contends that he also suffers from chronic post-traumatic headaches, right-sided C6 radiculopathy, disturbed sleep, jaw pain, post-traumatic stress disorder ("PTSD"), adjustment disorder, and somatic symptom disorder. He maintains that his injuries were aggravated in the Second Accident.
- [5] In broad terms, Mr. Brooks alleges that the injuries he sustained to his neck, upper back, and shoulder girdle in the First and Second Accident are indivisible. However, he acknowledges that the Second Accident caused divisible injuries to his shoulder joints.

- [6] A central issue is causation. The primary contention of the defendants is that Mr. Brooks has failed to prove his case; their submissions are anchored in an attack on the credibility of Mr. Brooks' evidence.
- [7] This case was hard-fought on all fronts. The parties are far apart on the various heads of damages, including non-pecuniary damages, loss of future earning capacity, loss of housekeeping capacity, cost of future care, and special damages.
- [8] Before addressing the damages analysis, I will summarize the pertinent facts established on the evidence.
- [9] At this point, it is appropriate to make a preliminary comment on the extensive clinical records that were adduced into evidence pursuant to the parties' document agreement. The clinical records were admitted as business records pursuant to s. 42(2) of the Evidence Act, R.S.B.C. 1996, c. 124.
- [10] It is well established on the authorities that the statements in the records attributed to Mr. Brooks are admissible for the fact that they were made but not for their truth. The observations of his medical condition made by the doctors and other healthcare professionals, the results of the tests performed or ordered by them, medical advice given, and the treatments provided and prescribed by the healthcare professionals are admissible as such. The weight of the authorities holds that a clinical record may be used to prove the fact that a certain diagnosis (which qualifies as an opinion) was made and recorded, but not to prove the accuracy or validity of the diagnosis: *Seaman v. Crook*, 2003 BCSC 464; *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431; *Edmondson v. Payer*, 2011 BCSC 118.
- [11] It is with these principles in mind that I have assessed the evidence in this case.
- [12] In these Reasons, the summary of facts reflects evidence that was either not in dispute, or, where it was in dispute, the factual findings I have made based on the consideration of the evidence as a whole. I have explained the reasoning underlying my findings where the evidence conflicted in a significant way on material points, or a party has urged that a particular inference be drawn from the evidence.
- [13] I will address the facts in the following order:
- General Background;
 - The First Accident;
 - January - June 2013;
 - The Move to California;
 - The Second Accident;
 - Neck Surgery and Post Surgery;

- Expert Medical Evidence;
- Conclusions on Mr. Brooks' Current Condition.

My findings on these matters will then guide the determination of Mr. Brooks' damages.

FACTS

General Background

- [14] Mr. Brooks is 37 years old and currently resides in a home in Eastvale, California with his wife and their young daughter, who was born in September 2017. He married Ms. Vredenburg in 2005. They purchased their home in 2014.
- [15] Mr. Brooks grew up in Quesnel, British Columbia. After his graduation in 1999, he attended various post-secondary institutions, where he completed various computer systems and management courses. He obtained a Bachelor of Technology degree from the British Columbia Institute of Technology in 2004. Following graduation, Mr. Brooks worked as a computer technician for the local school district in Dease Lake, British Columbia.
- [16] From 2006 until he moved to California in late June 2013, Mr. Brooks worked at Ritchie Brothers Auctioneering ("Ritchie Brothers") in the Lower Mainland as a software systems integrator. He eventually became a project supervisor. The preponderance of the evidence supports a finding that Mr. Brooks excelled in this position. He frequently worked overtime hours.
- [17] Mr. Brooks' work in the internet technology field, was largely sedentary and computer-focused. From 2007 until the First Accident, he saw his wife's chiropractor Dr. Peter Douwes for what he described as "maintenance treatments" for his postural issues and associated discomfort in his neck and back. I will return to his chiropractic treatments later in these Reasons. I note that prior to the First Accident, Mr. Brooks did not see his family doctor for any neck or back-related issues.
- [18] Mr. Brooks also attended ten physiotherapy treatments in the summer of 2012. The records indicate that he reported chronic mid-back pain and tight calf muscles from his prolonged posture sitting at a computer. He also reported elbow and hand pain. On June 25, 2012, on my reading of the records he reported that he was "much better" (and not that his neck was better, as was suggested to Dr. Caillier in cross-examination) and on August 29, 2012, that he was much improved. On July 18, 2012, he underwent intramuscular stimulation treatment on various muscles in his upper body (including trapezius, rhomboids, deltoids and triceps, as well as his cervical paraspinals from C4-C6), his lumbar spine and his calf muscles.

- [19] Prior to the First Accident, Mr. Brooks occasionally enjoyed tennis and outdoor recreational activities that included skiing, kayaking, camping and hiking. He also exercised in the gym occasionally. He and his wife enjoyed various leisure activities, including attending the movie theatre. Since his wife suffered from a constellation of health issues, including having been diagnosed with fibromyalgia, Mr. Brooks assumed the majority of the household duties, including purchasing groceries, vacuuming, cooking, laundry and sweeping.
- [20] The preponderance of the evidence supports a finding that prior to the First Accident, Mr. Brooks was not restricted in any of his recreational or leisure activities or in performing household duties.
- [21] Prior to the First Accident, Mr. Brooks occasionally suffered from some anxiety that manifested itself in hair pulling and nail biting. However, he did not experience any anxiety relating to driving.

The First Accident

- [22] At approximately 5:00 p.m. on January 5, 2013, the defendant, Gulalai Habib was driving westbound in her vehicle on Imperial Street in Burnaby. After passing through the intersection, she collided with the rear-end of Mr. Brooks' vehicle. It was stopped as they were waiting to turn left off Imperial Street into the parking lot of an auto parts store. As I stated earlier, Mr. Brooks' wife was driving and he was sitting in the front passenger seat.
- [23] In this paragraph, I summarize Mr. Brooks' description of the First Accident. Immediately preceding the collision, Mr. Brooks heard the sound of squealing tires and he turned his head over his left shoulder to look out the rear window. Upon impact, the back of Mr. Brooks' head hit the headrest. He immediately experienced the onset of a headache and became disoriented.
- [24] Mr. Brooks and his wife subsequently pulled in the parking lot to exchange information with Ms. Habib. Mr. Brooks felt pain at the base of his skull and into the top of his neck. The pain in his neck persisted and he described that in the following days, he developed increasing stiffness in his neck and pain in his upper back.
- [25] Mr. Brooks and his wife reported the First Accident to ICBC and brought the car to a claim centre. The estimate for the damage of the repair to the bumper was \$538.
- [26] The preponderance of the evidence I accept supports a finding that Mr. Brooks' head was rotated to the left at the time of impact. I reject the defendants' submission that Mr. Brooks fabricated this aspect of his testimony in an effort to substantiate his assertion that he sustained a significant neck injury in a minor motor vehicle accident. Ms. Vredenburg, who was in the vehicle, credibly corroborated that immediately prior to impact, Mr. Brooks had turned his head to look over his left shoulder. Mr. Brooks consistently reported this to the various health care professionals he saw, including Dr. Ozgur, Dr. Caillier, and Dr. Hirsch. The fact that Dr. Douwes recorded in his Accident Report - in answer to the question in a

standard form - that Mr. Brooks had not been aware of the impending collision is of no moment. The question is open to interpretation and there is no indication in the evidence of precisely what question Dr. Douwes put to Mr. Brooks at the material time.

January - June 2013

- [27] The uncontroverted evidence of Mr. Brooks is that he had been in a previous car accident in 2006. As a result of that accident, he had experienced some neck pain for some weeks. However, after a matter of weeks, he made a full recovery. I accept his evidence that he expected he would have a similar experience following the First Accident.
- [28] In the weeks following the First Accident, Mr. Brooks' neck, upper back, and shoulders were sore and he described experiencing a "whiplash" strain and stiffness in his neck. He took over-the-counter medication to alleviate his symptoms.
- [29] Mr. Brooks reported the First Accident to his chiropractor, Dr. Douwes, on January 9, 2013.
- [30] Dr. Douwes had treated Mr. Brooks from April 2007 to December 2012 for neck and back symptoms. His treatment included manipulations of all areas of Mr. Brooks' spine. Dr. Douwes also provided Mr. Brooks with nutrition and exercise advice. Mr. Brooks maintains that his back and neck symptoms prior to the First Accident were related to his sedentary job, which required extended hours working on a computer.
- [31] Mr. Brooks' counsel points out in the six months preceeding the First Accident, Dr. Douwes' records indicate only four visits. This is in contrast to the six months following the First Accident, during which Dr. Douwes' records indicate 21 visits for treatment. All of these post-accident visits were noted as ICBC-related.
- [32] Dr. Douwes, whose clinical notes were admitted into evidence, testified at trial. However, the Court did not have the benefit of any expert opinion from Dr. Douwes. Accordingly, as I stated earlier, any opinions contained in Dr. Douwes' records are not admissible for the validity of those opinions. The statements made by Mr. Brooks and recorded by Dr. Douwes are admissible for the fact that they were made but not for the truth of those statements.
- [33] Dr. Douwes made various reports to ICBC regarding the injuries Mr. Brooks sustained in the First Accident. On January 9, 2013, Dr. Douwes recorded that Mr. Brooks reported symptoms of a stiff and sore neck and upper back after the accident. On January 9, 2013, Dr. Douwes noted palpatory tenderness in the cervical and thoracic spine and that Mr. Brooks had pain on flexion and extension of the cervical spine.

- [34] On January 23, 2013, Dr. Douwes' report indicates that he treated Mr. Brooks for Grade II neck/upper back musculoskeletal injury. In both his May 2 and July 3, 2013 reports, Dr. Douwes recorded complaints of neck and upper back soreness. On May 5, 2013, he noted palpatory tenderness on the cervical and thoracic spine. In his testimony, Dr. Douwes observed that after the First Accident, Mr. Brooks' neck and upper back muscles were more sensitive on palpation than they had been prior to the First Accident.
- [35] Mr. Brooks and his wife have the same family doctor, Dr. Chodyra, whose clinical records were produced at trial. She did not testify at trial.
- [36] Mr. Brooks attended his wife's first appointment with Dr. Chodyra regarding her accident related injuries. The three of them discussed the fact that Mr. Brooks had been in the car at the time of the collision. Mr. Brooks had subsequent appointments with Dr. Chodyra for his allergy shots but they did not discuss his accident related injuries.
- [37] When Mr. Brooks' injuries did not improve, he booked an appointment with Dr. Chodyra on March 2, 2013. Dr. Chodyra noted that his neck range of motion was near normal with the sensation of tightness on lateral neck flexion. She also noted that his posterior shoulders were tender on palpation. Dr. Chodyra referred Mr. Brooks for physiotherapy treatments.
- [38] Mr. Brooks saw Dr. Chodyra again on March 8, 2013, and she noted "pain with L neck rotations and bilateral lateral flexion" and upper back and posterior shoulder symptoms. Mr. Brooks attended appointments with Dr. Chodyra on April 27, June 17 and June 19, 2013. On April 27, 2013, she noted "ongoing upper back, neck and shoulders [sic] pain following MVA". On June 19, 2013, she again noted "ongoing neck and upper back pain". She diagnosed soft tissue injury.
- [39] Dr. Chodyra also prescribed Mr. Brooks both anti-inflammatory and muscle relaxant medications for his symptoms.
- [40] From February through June 2013, Mr. Brooks also attended physiotherapy sessions at Impulse Sports Therapeutics. Initially, Mr. Brooks' stated objective in seeking physiotherapy treatments in February 2013 was primarily to strengthen his postural muscles in his mid-back in order to obtain more long-term relief from his postural issues. On February 28, 2013, the physiotherapist noted that the rotation of Mr. Brooks' left cervical spine was restricted. Extension and flexion were also slightly reduced. On March 7, 2013, the physiotherapist noted that Mr. Brooks presented with neck pain and that "left side flexion of his cervical spine was limited".
- [41] By March 14, 2013, Mr. Brooks' file for his physiotherapy sessions was changed to an ICBC file. The clinical records indicate that Mr. Brooks reported neck and thoracic pain from his car accident. At this appointment, the physiotherapist noted "overall decrease muscle tone in his cervical spine". Mr. Brooks had 22 further physiotherapy treatments for his neck and upper back before he moved to California.

- [42] After the First Accident, Mr. Brooks began to experience anxiety symptoms and panic attacks while driving, particularly when he was a passenger.
- [43] After the First Accident, Mr. Brooks experienced pain and difficulties lifting heavier items and performing his household duties. He drove to the interior of British Columbia in March 2013, to attend a wedding, and again in May 2013, to see his family before he left for California. I accept his evidence that he experienced significant discomfort on both occasions. His leisure activities, such as attending the movie theatre, were negatively impacted and his concentration was compromised because of his discomfort and pain.
- [44] Mr. Brooks became irritable and impatient. His marital relationship which was strained before the First Accident became increasingly strained. His intimate relationship with his wife was adversely affected.
- [45] Ms. Vredenburg, whose evidence I accept, recounted to the Court that after the First Accident, Mr. Brooks became distracted, difficult to communicate with and not fully "present" in their relationship. She observed him being agitated and unpleasant when he was engaged in activities that cause him discomfort and pain. She credibly described her observations regarding Mr. Brooks' diminished ability to relax. She described him as constantly shifting positions, even when watching a movie.
- [46] After the First Accident, Mr. Brooks also suffered from headaches on an intermittent basis and on occasion, his sleep was disrupted.
- [47] Mr. Brooks maintains that his bruxism became worse after the First Accident. He had a night guard for approximately three years prior to the First Accident but wore it only occasionally. He maintains that after the First Accident, he had to wear the night guard every night and that he developed jaw pain.
- [48] In addition to his chiropractic and physiotherapy treatments, prior to moving to California in late June 2013, Mr. Brooks underwent trigger point injections for his persistent neck pain. He did not find these treatments effective in alleviating his symptoms.
- [49] From the First Accident until he resigned in June 2013 from Ritchie Brothers, Mr. Brooks did not miss any days of work on account of his injury.

Move to California

- [50] In late 2012, Mr. Brooks and his wife decided to relocate to California, where his wife had been raised, in order that they could purchase a home. Prior to leaving Canada, Mr. Brooks had secured employment at HireRight Inc. in California. Arrangements were made for him to commence employment in July 2013. He continues to be employed by HireRight Inc. in California as a senior systems application engineer.

- [51] Mr. Brooks and his wife moved to California at the end of June 2013. They had packed up their non-essential items well in advance of the move. In 2013, they hired professional movers who assisted them in finishing their packing. Mr. Brooks and his wife then drove to California with only their personal belongings and suitcases. Mr. Brooks, who continued to be symptomatic from his injury, did most of the driving, which took three days. He found it difficult and uncomfortable.
- [52] Upon arrival in California, Mr. Brooks initially attempted to help with the move but asserts that his condition deteriorated. He experienced shooting pains from his neck into his shoulders. His wife described him during this time period as increasingly agitated, impatient and short-tempered.
- [53] Mr. Brooks attended between four and six chiropractic sessions in July 2013 in California, for which he paid privately.
- [54] He commenced his new employment in July 2013. Mr. Brooks' health care insurance offered through his new employer became effective August 1, 2013. To the extent the defence alleges it was earlier, I find Mr. Brooks' evidence on the point harmonizes with the preponderance of the reasonable probabilities of the case.
- [55] In August 2013, shortly after his medical coverage became effective, Mr. Brooks saw Dr. Samuel Park, a primary care physician in California. According to Mr. Brooks, he sought medical advice because the symptoms from his whiplash injury were persisting and he wanted a referral for physiotherapy. Dr. Park referred him for physiotherapy treatments and an MRI scan of his neck. Dr. Park also prescribed Mr. Brooks a muscle relaxant, an anti-inflammatory medication and Cymbalta for pain management.
- [56] When Mr. Brooks attended physiotherapy treatments on August 12, 2013, the physiotherapist noted a decreased range of motion in Mr. Brooks' cervical spine. From August 14, 2013 to September 9, 2013, Mr. Brooks attended five further physiotherapy treatments for his neck and upper back. The clinical records note that Mr. Brooks continued to have a decreased range of motion in his neck.
- [57] Dr. Park subsequently informed Mr. Brooks that the MRI had revealed a jumped facet joint and possible fracture at C5-C6 levels of the spine. Dr. Park then ordered a follow-up CT scan, as recommended by the radiologist. On September 4, 2013, after reviewing the report from the CT scan, Dr. Park informed Mr. Brooks that the imaging likely showed a congenital abnormality and not a fracture.
- [58] Mr. Brooks understandably was very concerned. According to Mr. Brooks, he faxed Dr. Chodyra a copy of the CT report and, in a subsequent telephone call, she recommended that Mr. Brooks consult a neurosurgeon in California for a second opinion. The objective evidence shows that a copy of the report was in Dr. Chodyra's file with a fax cover sheet from Mr. Brooks thanking her for reviewing it and stating that his neck had not "gotten any better even after 6-7 months of PT".

- [59] After conducting research on various websites, including perusing reviews of neurosurgeons, Mr. Brooks decided to see the head neurosurgeon at the Brain and Spine Center at the Hoag Hospital in California. Mr. Brooks had his first consultation with Dr. Burak Ozgur on September 16, 2013.
- [60] Dr. Ozgur examined Mr. Brooks and after reviewing the MRI and CT scan, ordered additional imaging of the cervical spine. He also recommended that Mr. Brooks hold off on any further physiotherapy treatments. At their second appointment on November 4, 2013, Dr. Ozgur noted subjective and objective weakness in Brooks' right bicep. He recommended that Mr. Brooks undergo spinal surgery. Mr. Brooks, who was continuing to experience pain in his neck, upper back, and shoulders, took some time to consider his options. He subsequently decided to proceed with the surgery recommended by Dr. Ozgur. The surgery was scheduled for December 19, 2013.
- [61] It is common ground that Dr. Ozgur diagnosed a unilateral right C5-6 jumped facet and right C6 pars fracture. Although his clinical records were admitted at trial, Dr. Ozgur did not provide any opinion evidence at trial. Accordingly, his diagnosis is admissible for the fact that it was made, but not for the validity of that diagnosis.

The Second Accident

- [62] Unfortunately, on December 2, 2013, Mr. Brooks was involved in another motor vehicle accident in California. The vehicle he was driving was hit in the rear.
- [63] Mr. Brooks described the Second Accident as being less forceful than the First Accident. On the way home, Mr. Brooks began to feel unwell and in addition to his neck pain, he developed a headache and pain in his right arm.
- [64] The day after the Second Accident, Mr. Brooks went to see Dr. Park. At this appointment, because of his impending neck surgery, Dr. Park did not prescribe any medication but recommended that Mr. Brooks take a hot bath. On two occasions, after Mr. Brooks had taken a hot bath, the whole of Mr. Brooks' right arm went numb.
- [65] On December 19, 2013, Dr. Park told Mr. Brooks to stop the warm baths and prescribed him steroid medication and Tylenol 3. Dr. Park noted spasm tenderness and a decreased range of motion in Mr. Brooks' neck and back and that he was experiencing radiating pain in his right upper extremities.
- [66] When Mr. Brooks reported the Second Accident to Dr. Ozgur's office, a further MRI was ordered. The MRI did not reveal any significant changes.

Neck Surgery

- [67] The Neck Surgery proceeded as scheduled on December 19, 2013. Dr. Ozgur performed a front and back cervical fusion with an anterior cervical discectomy at C5/C6 and a posterior unilateral instrumentation. There was a reconstruction at C5/C6 with a cage and plate.

Post-Surgery

- [68] After the Neck Surgery, Mr. Brooks wore a neck brace for three weeks. He described suffering severe pain in the interscapular area between his shoulder blades immediately following the surgery. He was restricted to not carrying more than five pounds. He took oxycodone narcotic pain medication for three weeks.
- [69] After the Neck Surgery, Mr. Brooks was also prescribed a bone growth simulator to wear to ensure the fusion would be successful. Mr. Brooks was allergic to the pads on the device and he endured the resulting allergic reaction during the three months he was required to wear it.
- [70] Mr. Brooks was also referred to a pain management specialist who prescribed a variety of pain medications. I accept that some of the pain medication affected his cognition and ability to concentrate. During his recovery, Mr. Brooks worked at home before returning to work in the office in February 2014.
- [71] Once he was cleared to do so, Mr. Brooks attended 38 post-operative physiotherapy treatments between April 1 and August 12, 2014.
- [72] Mr. Brooks underwent two or three nerve ablations in 2014 and 2015. While he found that the pain in his left shoulder blade significantly diminished after the treatment, he found the procedure itself very painful and that the effectiveness of the pain relief was of limited duration.
- [73] Mr. Brooks attended a rehabilitation centre from September 2014 through to September 2016, where he had sessions of active physical therapy for his neck and upper back. He also was given an exercise program to do independently.
- [74] Mr. Brooks had physical therapy relating to his bruxism and jaw complaints from December 2015 until March 2016.
- [75] After the Neck Surgery, Mr. Brooks developed some unusual symptoms (sudden severe pain in his shoulder precipitated by a simultaneous cervical rotation to the right with either yawning or laughing). Dr. Ozgur referred him to a neurologist. He underwent a comprehensive neurological consultation with Dr. Schumacher on April 24, 2014. The results of the nerve conduction studies were abnormal. There was no follow-up appointment with Dr. Schumacher.

- [76] Mr. Brooks also suffered from pain, numbness and tingling in the top of his shoulders. He eventually had arthroscopic debridement surgery on each shoulder. He underwent those surgeries on November 2, 2016 and February 1, 2017. The surgeries resolved the majority of his symptoms in his shoulder joints. In this action, Mr. Brooks is not seeking any relief associated with his shoulder joint issues.
- [77] Mr. Brooks had 18 counselling sessions with a clinical psychologist from December 2013 to November 2014. The clinical notes show that the primary focus of the therapy sessions was his marriage. He commenced attending sessions with another clinical psychologist, Dr. Darrington in 2014. He continues to see her for his marital issues, interpersonal difficulties with his family, and issues relating to his anxiety, including anxiety relating to driving and what he described as his PTSD.
- [78] Although Mr. Brooks acknowledged that the Neck Surgery improved his neck symptoms, he says that the surgery did not alleviate all of his symptoms; he continues to experience pain in his neck and shoulder blades.
- [79] As I mentioned, Mr. Brooks was involved in the Third Accident on March 23, 2016. He maintains that he had recovered from the temporary aggravation of his symptoms by June 2016. In this action, he is not seeking any compensation for any temporary aggravation he may have sustained in the Third Accident.

Expert Medical Evidence

Plaintiff's Experts

- [80] Mr. Brooks relied on the expert evidence of Dr. Caillier, Dr. Goldstein, and Dr. Rickards. Each of the doctors attended for cross-examination at trial. The key portions of the reports are summarized below:
- (i) Dr. Lisa Caillier
- [81] Dr. Caillier is a physical medicine and rehabilitation specialist who assessed Mr. Brooks on August 14, 2015. In her report dated November 30, 2015, she opined that the First Accident caused a soft tissue musculoligamentous injury to Mr. Brooks' neck, upper back and posterior shoulder girdle region. Additionally, she opined that the First Accident caused headaches, disrupted sleep, physical deconditioning and difficulties engaging in certain activities that required sustained posturing or "are repetitive in nature through the shoulder region". She opined that the Second Accident aggravated his pre-existing neck pain, headaches and right upper extremity symptoms and negatively impacted his physical conditioning and mental health.
- [82] Dr. Caillier opined that Mr. Brooks' current chronic neck pain is both soft tissue as well as mechanical in nature. In her opinion he also suffers from chronic soft tissue pain in the upper back and shoulder girdle region, as well as radiating symptoms into his right arm.

[83] Dr. Caillier opined that "but for the accident of July 5, 2013, as well as further aggravation by the December 2, 2013 motor vehicle accident he would likely not have his current symptomatic complaints".

[84] It is Dr. Caillier's opinion that the First Accident rendered the congenital abnormalities in Mr. Brooks' spine symptomatic. She states that while it is possible that without the First Accident the congenital or pre-existing abnormalities could have resulted in future neck complaints, it is not known when, or if, that would have happened.

[85] Insofar as Mr. Brooks' prognosis, she states:

Prognosis: Given the chronicity of his neck, upper back, and shoulder girdle pain as well right radiating arm complaints, the likelihood of Mr. Brooks becoming symptoms free is poor. He is likely to have ongoing pain now and into the future. He is not going to become pain free.

In my opinion, there is still the opportunity for his pain to be better managed provided he benefits from recommendations made. However, even with benefit from recommendations made, he will likely continue to have pain on a daily basis dependent upon his activity level and the duration of the activity.

In my opinion, there is increased susceptibility and vulnerability to worsening of pain should he sustain future trauma to the neck, back, and shoulder girdle region.

(ii) Dr. Gayle Goldstein

[86] Dr. Goldstein, who has a doctoral degree in clinical psychology, is a registered psychologist in British Columbia. At the request of his counsel, she conducted a clinical interview of Mr. Brooks on October 15, 2016, and spoke to his wife regarding her observations of him. She prepared a report dated November 21, 2016. At trial, I ordered that certain contents of her report be expurgated on the basis that certain portions were not properly admissible opinion evidence that she was qualified to provide.

[87] In her report, Dr. Goldstein opined that Mr. Brooks met the diagnostic criteria for PTSD, somatic symptom disorder, specific phobia related to driving as a passenger, adjustment disorder with mixed disturbance of emotions and conduct. In submissions, his counsel advised the Court that Mr. Brooks is not pursuing any claim related to her provisional diagnosis of a neurocognitive disorder.

[88] Dr. Goldstein opines that the PTSD, the somatic symptom disorder and adjustment disorder arose as a result of the First Accident. She explains that the somatic symptom disorder is a psychological or psychiatric diagnosis "and refers not to the quantity or quality of pain Mr. Brooks' experiences but rather to his emotional attitude and perceptual behavioural responses to that pain".

[89] In her report, Dr. Goldstein concludes:

Mr. Brooks clinical presentation is, in my opinion, a complex array of hyper vigilance and startle related to trauma, frustration, depressed mood, anxiety and chronic pain. According to Mr. Brooks and his wife, Mr. Brooks was functioning well in all areas of his life at the time of the accident. Following the MVA he has not regained his pre-accident functioning in any domain.

With regards to prognosis, it has been three years since the collision and the prognosis must be considered now as guarded to fair.

It is still possible that with continued treatment for his post-MVA anxiety, trauma and pain problems that there would be symptomatic improvement but is more unlikely as further time elapses that any such improvement would be translated into full functional recovery and this is based on my extensive clinical experience of treating such patients. Therefore, it is likely that Mr. Brooks will continue to have challenges relating to pain and anxiety and this will likely compromise and undermine his work advancement, confidence in the workplace, social and personal life.

(iii) Dr. Robin Rickards

[90] Dr. Rickards is an orthopaedic surgeon who assessed Mr. Brooks on October 7, 2016. He diagnosed Mr. Brooks with probable cervical facet joint syndrome. In his report dated October 28, 2017, he opined that Mr. Brooks presented with symptoms and clinical findings in his neck suggestive of irritation of the facet joints.

[91] With respect to causation, he concluded as follows:

Causation

Status Post C5-C6 surgical Fusion/Probable Cervical Facet Joint Syndrome

The relationship in time between the motor vehicle accident of January, 2013 and onset of neck symptoms suggest that these two events are related in a cause-effect relationship. Chiropractic records pre-MVA do note neck and midback symptoms dating back to 2007. These symptoms appear to be different in intensity from those symptoms appearing following the motor vehicle accident of January, 2013.

Clinical records suggest a congenital abnormality present at the C5-C6 area [a variant of bony structure present since birth and not related to MVA injury] with an MVA related injury to the bony structure of C6.

[92] Insofar as prognosis, Dr. Rickards opines that the principal concern is the development of progressive degeneration above and below the cervical fusion site. He opined that the likelihood of progressive arthritic change in the disc levels above and below the fusion site is in the range of 25% at 10 years post-surgery.

[93] Dr. Rickards observes that Mr. Brooks' neck symptoms could be improved with repeat radiofrequency ablation, but it is unlikely to either completely or permanently resolve his neck symptoms.

Defendant's Experts

[94] The defendants relied on the expert evidence of Dr. Paquette, Dr. Graeb, and Dr. Hirsch. Dr. Paquette and Dr. Hirsch both attended for cross-examination. The key aspects of their reports are summarized below.

(i) Dr. Scott Paquette

[95] Dr. Paquette is a well-qualified neurosurgeon who practices at Vancouver General Hospital. His clinical practice is focussed exclusively on spines. He provided an expert report dated March 9, 2018. His report is based on a review of Mr. Brooks' medical records.

[96] Dr. Paquette opined that the CT scan revealed the diagnosis of a congenital abnormality of a cervical facet joint without evidence of any subluxation and without evidence of nerve compression. In his view, the First Accident did not create the abnormality in the cervical facet joints that Dr. Ozgur later inappropriately (in Dr. Paquette's opinion) diagnosed as a dislocated facet joint.

[97] In his report, Dr. Paquette concludes as follows:

After reviewing this complex case, it is my opinion that Mr. Brooks likely incurred a soft tissue injury to his neck resulting in increased neck and back pain as a result of the first accident. This accident did not create the congenital abnormality in his cervical spine, nor did he exhibit symptoms which would suggest surgical fixation of his cervical spine was indicated prior to the events of the second motor vehicle accident .

It is my opinion that Mr. Brooks' surgical treatment was not a consequence of his first motor vehicle accident. Absent motor vehicle #1, I do not believe Mr. Brooks would have had any difference in his clinical course of neck pain, or treatment aside from supportive treatment such as physiotherapy and analgesics. The vast majority of individuals with soft tissue injuries will show improvement within months after an injury and a few individuals will continue to have symptoms of pain beyond two years. Unfortunately, that natural history did not have a chance to run its course for Mr. Brooks as a subsequent accident and surgical intervention have skewed his clinical outcome.

(ii) Dr. Douglas Graeb

[98] Dr. Graeb is a very experienced neuroradiologist who retired from hospital practice in June 2013. At the request of defence counsel, he reviewed the five imaging studies of Mr. Brooks' spine in 2013 and 2014.

[99] In his report dated February 13, 2018, Dr. Graeb opines that the imaging shows cervical spondylolysis at C6, a longstanding developmental abnormality. This finding is associated with a number of additional abnormalities in Mr. Brooks' spine. He concludes that the findings are inconsistent with an unhealed fracture that could be attributed to the First Accident and that there is no malalignment of the vertebral bodies that would suggest a ligament injury. Dr. Graeb also notes that there is no evidence to suggest nerve root compression at any level.

(iii) Dr. Gabriel Hirsch

[100] Dr. Gabriel Hirsch is a physical medicine and rehabilitation expert specialist, who assessed Mr. Brooks on January 15, 2018.

[101] In his report of the same date, Dr. Hirsch states that based on his review of the clinical records, Mr. Brooks' symptoms following the First Accident were similar to the symptoms noted by Dr. Douwes prior to the First Accident.

[102] He opines that "in the worse case scenario, Mr. Brooks sustained a very minor injury to his neck" in the First Accident, from which he made a full recovery within a few weeks. He concludes that Mr. Brooks did not incur any significant structural damage to his neck in the First Accident and that none of the medical treatment he received in the United States is causally connected to the First Accident.

Response Report of Dr. Heran to Dr. Paquette

[103] Dr. Navraj Heran is a neurosurgeon who practices at the Royal Columbian Hospital and Eagle Ridge Hospital. At Mr. Brooks' request, Dr. Heran responded to Dr. Paquette's report. Like Dr. Paquette, he did not examine Mr. Brooks but reviewed his clinical records. After hearing submissions, I ruled that portions of his report dated April 9, 2018, were inadmissible. His redacted report was admitted into evidence.

[104] Based on his review of the clinical records, Dr. Heran diagnosed Mr. Brooks with myofascial injuries involving the neck and upper torso, mechanical pain likely arising from the C5-C6 level, cervicogenic headaches, and chronic pain.

[105] Dr. Heran agreed with Dr. Paquette that the imaging did not suggest that a spinal fracture arose as a consequence of the First Accident. He also agreed with Dr. Graeb that Mr. Brooks has underlying congenital abnormalities.

[106] Dr. Heran opined that the First Accident resulted in mechanical changes arising at C5-C6 with damage to the structural elements, notably, the facet joints and likely the pars defect on the right side. He explained that Mr. Brooks' presentation of gradual worsening as time went on over many months is suggestive of damage that occurred at these sites. He notes in his report that Mr. Brooks had further worsening following the Second Accident with additional neurogenic changes to his upper right extremity.

[107] In sum, he opined that Mr. Brooks' facet joints were likely injured as a consequence of the First Accident and likely further aggravated by the Second Accident.

[108] In response to Dr. Paquette's opinion that more time should have been given to allow for Mr. Brooks' symptoms to improve, Dr. Heran noted the progression of Mr. Brooks' symptomology as time went on. Given Mr. Brooks' clinical presentation, Dr. Heran was of the view that surgery was reasonable at the time it was offered. While he agreed with Dr. Paquette that further investigations are often indicated prior to undertaking surgery, he stated that when structural sources of pain are prominent and imaging demonstrates structural spinal abnormalities consistent with the source of symptoms, proceeding with surgical management is reasonable and appropriate.

Adverse Inference

[109] The defence asked that I draw an adverse inference from Mr. Brooks' failure to tender opinion evidence from Dr. Anne Chodyra, Dr. Samuel Park, Dr. Burak Ozgur and Dr. Darrington.

[110] It is well established on the authorities that an inference adverse to a litigant may be drawn if that litigant fails to call a witness who could reasonably be expected to provide supporting evidence. The appellate authorities have recognized that an adverse inference is discretionary and should not be drawn unless it is warranted in all the circumstances. Given the contemporary disclosure rules, in many circumstances both parties have equal access to information and may call those witnesses whose evidence might assist them.

[111] In *Thomasson v. Moeller*, 2016 BCCA 14 at para. 35, and *Singh v. Reddy*, 2019 BCCA 79 at para. 27, the Court of Appeal affirmed that an adverse inference is not to be drawn where a witness is available to both parties. It is appropriate to decline an adverse inference on this basis alone: *Singh v. Chand*, 2019 BCSC 932 at para. 83.

[112] In *Buksh v. Miles*, 2008 BCCA 318, the Court of Appeal provided guidance on the factors that inform the analysis of whether an adverse inference should be drawn for the failure to call a treating physician. The factors include the following:

- the evidence before the court;
- the explanations proffered for not calling a witness;
- the nature of the evidence that could be provided by the witness;
- the extent of disclosure of the pertinent clinical notes; and,
- the circumstances of trial, including for example, whether there was a document agreement regarding admission of clinical records.

- [113] Counsel for Mr. Brooks points out that the defendants had the benefit of full disclosure of each of treating physician's clinical notes, and that the parties had entered into a document agreement, in part to avoid the necessity of calling each physician. Moreover, he notes that Drs. Park, Ozgur and Darrington each reside in California and adducing their evidence would inevitably have increased the cost and length of trial. He also underscores that Mr. Brooks' chiropractor, Dr. Douwes, who has been treating him before and after the First Accident, testified at trial.
- [114] I will address each of the doctors in turn.
- [115] Dr. Chodyra was Mr. Brooks' primary care physician at the time of the First Accident. She treated him from approximately April 2008 until he moved to California at the end of June 2013, only months after the First Accident. Dr. Chodyra's records show no indication that she had treated Mr. Brooks for any musculoskeletal issues in the pre-accident period. She did not treat Mr. Brooks after he moved to California. Her clinical records were provided to the defendant and both of the experts who testified on behalf of the defendants were provided with those records. Mr. Brooks' counsel further asserts that it is unlikely that Dr. Chodyra would have any independent recollection of her interactions with Mr. Brooks beyond what is contained in her clinical records.
- [116] The defendants clearly had the opportunity to speak to Dr. Chodyra and call her as a witness if they desired to do so. I note that Dr. Chodyra was listed as a witness on the defendants' trial brief, but for reasons that were not disclosed at trial, they chose not to call her.
- [117] In all the circumstances, I am not persuaded that it would be appropriate to draw an adverse inference against Mr. Brooks for his failure to call Dr. Chodyra.
- [118] Dr. Park is Mr. Brooks' family physician who has treated him in California since August 2013. Mr. Brooks' counsel points out that because of his attendance on various specialists, Mr. Brooks does not see Dr. Park on a frequent basis. Mr. Brooks underscores that all of Dr. Park's medical records were provided to the defendants and it was open to the defendants to call Dr. Park as a witness.
- [119] In all the circumstances, I agree with Mr. Brooks that it would not be fair to draw an inference that Dr. Park would have given evidence detrimental to Mr. Brooks' case.
- [120] Dr. Ozgur is Mr. Brooks' treating neurosurgeon in California who performed the surgery on Mr. Brooks' neck on December 19, 2013. In response to the defendants' application brought in final submissions to amend their pleadings to add an allegation that Dr. Ozgur was negligent, Mr. Brooks' counsel filed an affidavit, which shows that Dr. Ozgur refused to provide a medical-legal report. As with the other health care providers, Dr. Ozgur's records were provided to the defendants.
- [121] In these circumstances, I do not consider it appropriate to draw an adverse inference against Mr. Brooks for his failure to call Dr. Ozgur.

- [122] Regarding Dr. Darrington, she did not treat Mr. Brooks prior to the First Accident. Her records were produced to the defendants. She was equally available to the defendants as a witness.
- [123] In these circumstances, I am not persuaded that it is appropriate to draw an adverse inference against Mr. Brooks for his failure to call Dr. Darrington.
- [124] I note that Mr. Brooks retained Dr. Goldstein, a registered psychologist in B.C., to provide her opinion on the extent of his psychological issues that were allegedly occasioned by the First Accident.
- [125] Finally, Domenic Pierri was Mr. Brooks' treating physiotherapist from February 20, 2013 until June 27, 2013. His clinical records were disclosed in their entirety to the defendants. Mr. Pierri was available to the defendants. In fact, Mr. Pierri also listed as a witness for the defence in their trial brief but the defendants ultimately chose not to call him. In the end, I decline to draw any adverse inference against Mr. Brooks for not calling Mr. Pierri.
- [126] I next address the defence position that an adverse inference ought to be drawn from Mr. Brooks' failure to call evidence from witnesses such as family members or friends, who allegedly would be expected to be in a position to corroborate Mr. Brooks' testimony concerning the alleged impairment in his physical abilities and consequent limitations in his functioning. The defence also points out that no witnesses were called from either Ritchie Bros. or HireRight Inc. to corroborate the alleged impact of Mr. Brooks' injuries on his functioning in the workplace.
- [127] First, Mr. Brooks points out that he did call his wife, Ms. Vredenburg, regarding the changes she observed in him after the First Accident.
- [128] The defendants specifically point to the absence of Ms. Hendy, Mr. Brooks' aunt, who originally was scheduled to testify at trial. Counsel explained that given her limited observations regarding Mr. Brooks' condition through the course of his injuries and the time pressures of trial, he determined that Ms. Hendy's testimony was unnecessary. Perhaps most significantly, he points out that Ms. Hendy spoke to agents for the defendants and they knew what her testimony would be. Counsel for the defendants could have called Ms. Hendy if they believed that her testimony would have advanced their litigation position.
- [129] Mr. Brooks' counsel also notes that, pursuant to the request of the defendants, he sent contact information for six other family members to the defendants on March 7, 2018. Mr. Brooks was not in a unique position to call upon such witnesses; their evidence would have been available to the defence through pre-trial interviews or, had they been uncooperative, through scheduling depositions.
- [130] Mr. Brooks commenced his employment with his current employer after the First Accident. Accordingly, his colleagues would not be in a position to make any meaningful observations on the alleged impact of the First Accident on Mr. Brooks' functioning.

- [131] Again, it was open to the defendants to approach either or both of Mr. Brooks' current and former employers to make inquiries regarding his performance.
- [132] All things considered I do not see this as an appropriate circumstance to draw an adverse inference. Rather, the essential issue is whether I can be satisfied Mr. Brooks has proven his case on a balance of probabilities without having called such collateral witnesses: *Khudabux v. McClary*, 2016 BCSC 1886 at para. 159, *aff'd* 2018 BCCA 234.

Comments on Credibility and Reliability

- [133] The defendants waged a full-scale attack on Mr. Brooks' credibility and the reliability of his evidence.
- [134] In final submissions, defence counsel urged the Court to find that Mr. Brooks had fabricated aspects of his evidence. The defence alleges, primarily based on the clinical records, a multitude of omissions and inconsistencies in what Mr. Brooks reported to the various healthcare professionals. Their overarching submission is that Mr. Brooks is neither a credible nor reliable historian and that his reporting is "rife with inconsistencies, improbabilities and untruths".
- [135] According to his counsel, Mr. Brooks was a sincere witness who described significant post-accident changes in his physical and emotional health and functioning in a credible manner that was supported by the objective evidence.
- [136] The assessment of Mr. Brooks' credibility and reliability is key in determining the causation of his injuries and the nature and severity of those injuries. This assessment is also critical to the weight to be given the various medical opinions because to varying degrees, they are predicated on Mr. Brooks' reporting of material facts.
- [137] The factors to be considered when assessing credibility were summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398, *aff'd* 2012 BCCA 296. They include (at para. 186):
- the firmness of the witness' memory;
 - the ability of the witness to resist the influence of interest in modifying his or her recollection;
 - whether the witness' evidence harmonizes with independent evidence that has been accepted;
 - whether the witness changes his or her evidence during examination for discovery, direct examination and cross-examination, or is otherwise inconsistent in his or her recollections;
 - whether the witness' evidence seems generally unreasonable, impossible, or unlikely; and,
 - the witness's demeanour.

- [138] Ultimately, the court's assessment of the credibility of a witness' testimony turns on whether the evidence is in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 357.
- [139] There is a distinction between credibility and reliability. Credibility relates to the willingness of a witness to speak the truth as he or she sincerely believes it to be. Reliability relates to the actual accuracy of the testimony of a witness: *R. v. Morissey* (1995), 22 O.R. (3d) 514 (C.A.); *R. v. H.C.*, 2009 ONCA 56 at para. 41; *Sull v. Pengelly*, 2019 BCSC 575 at paras. 25-27. A witness may sincerely believe that he or she is telling the truth, but lack sufficient memory, perspective, cognitive ability or narrative capacity to give reliable testimony. Alternatively, a witness "may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10 [*Hardychuk*].
- [140] Consistency may be a significant factor in assessing credibility. However, given the inherent frailty of memory, some inconsistency is to be expected. In some cases, an individual's memory may be stimulated by other evidence, which may prompt a witness to recall details of an event that he or she had seemingly forgotten: *Sateri (Shanghai) Management Limited v. Vinall*, 2017 BCSC 491 at para. 32.
- [141] In *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114, Mr. Justice Smith provided instructive commentary on the evidentiary use of clinical records:
- [142] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.
- [142] With respect to alleged inconsistencies in clinical records, Mr. Justice Smith went on to observe:
- [35] Further difficulties arise when a number of clinical records made over a lengthy period are being considered. Inconsistencies are almost inevitable because few people, when asked to describe their condition on numerous occasions, will use exactly the same words or emphasis each time. As Parrett J. said in *Burke-Pietramala v. Samad*, 2004 BCSC 470, at paragraph 104:

...the reports are those of a layperson going through a traumatic and difficult time and one for which she is seeing little, if any, hope for improvement. Secondly, the histories are those recorded by different doctors who may well have had different perspectives and different perceptions of what is important. ... I find little surprising in the variations of the plaintiff's history in this case, particularly given the human tendency to reconsider, review and summarize history in light of new information.

[36] While the content of a clinical record may be evidence for some purposes, the absence of a record is not, in itself, evidence of anything. For example, the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion.

[143] I will endeavour to outline some aspects of Mr. Brooks' evidence that were highlighted by the defence. While I accept that the credibility and reliability of his evidence must be scrutinized with care, at this point I do not propose to address each of the alleged deficiencies. In these Reasons, I address the other allegations in the context in which they arise.

[144] Dr. Aberra was Mr. Brooks' treating psychologist in California from December 2013 through 2014. In his initial visit on December 18, 2013, Dr. Aberra recorded in her clinical notes that, after mentioning that his wife had her own therapist, Mr. Brooks told her "he lies automatically for no reason" and "lies to make self look better and/or to avoid conflict".

[145] At trial, Mr. Brooks explained that he made these statements in the context of his discussion with Dr. Aberra regarding his relationship with his wife. On review of the clinical records as a whole, it is clear that the focus of his 18 therapy sessions with Dr. Aberra was his marital issues. I accept that Mr. Brooks was referring solely to his wife when he made these statements to Dr. Aberra. I am fortified in my conclusion by the fact that later in the records, Dr. Aberra makes a specific reference to his wife and notes that Mr. Brooks "is not able to say the truth to her because she gets upset, offended and defensive". I am not persuaded that this admission, made in the context of a therapeutic relationship, diminishes the credibility of Mr. Brooks' evidence on the central issues at trial. In all the circumstances of the case, I have concluded that it would be unjust to make an adverse credibility finding in consequence of his statements to his therapist.

[146] Mr. Brooks did not make an appointment to see his family doctor, Dr. Chodyra, about the injuries he says he sustained in the First Accident until March 2, 2013. He explained that, during his wife's initial appointment with Dr. Chodyra regarding the First Accident, they had informally discussed that he too had been involved in the accident. Mr. Brooks did not mention his injuries to Dr. Chodyra in the short, subsequent appointments he had with her for his allergy shots. Mr. Brooks' evidence was that in 2007, he had suffered whiplash injuries from a prior accident, which had subsequently resolved in short order. His evidence on this point was uncontroverted. Mr. Brooks went on to explain that he was

expecting that his current injuries would follow the same clinical course and resolve on their own. When his injuries did not improve as he anticipated, he made an appointment with Dr. Chodyra in early March to specifically address what he described as his "whiplash" injury. While I found this aspect of his evidence troubling when considered in the context of the evidence as a whole, Mr. Brooks' explanation has the ring of truth. I cannot say that he acted unreasonably.

- [147] In a similar vein, the defendants point out that when Mr. Brooks initiated visits to a physiotherapist in February 2013, he reported having six years of mid-back pain corresponding to when he had started a desk job. He was seeking an exercise program for strengthening those muscles. The defendants assert that since the records do not show that Mr. Brooks initially reported the accident to the physiotherapist, this demonstrates he was not injured or that he had recovered from the First Accident. I found this troubling but as with the preceding paragraph, it must be considered in the context of the evidence as a whole.
- [148] The goal on the initial physiotherapy visit in February was recorded as improving strength in "postural muscles" and was recorded as a private payment treatment. The physiotherapist treated Mr. Brooks' calves as well as his neck and back. I note that the clinical records of the physiotherapist's initial assessment of Mr. Brooks in February recorded a decreased range of motion in his neck in multiple directions.
- [149] In March 2013, the designation for the treatments was changed to ICBC. Mr. Brooks is recorded as indicating that his goal was to decrease his neck and thoracic pain that he had "been experiencing since the car accident". Thereafter, Mr. Brooks' neck and upper back issues were the main focus of the physiotherapy treatments. He went on to have 23 physiotherapy treatments from March 7 through to June 2013, specifically on his neck and upper back.
- [150] In British Columbia, Mr. Brooks says he underwent treatment on his neck and upper back (the Graston technique) that he found very painful. To the extent the defence disputes this, I find that it is more probable than not that the abbreviation "LS" in the physiotherapist records refer to the levator scapulae, a muscle that runs from the shoulder blade into the side of the neck, rather than the lumbar spine, as is alleged by defence counsel. Notably, the clinical records from the physical therapy Mr. Brooks attended in California in August 2013 note tightness to his "levator scap". The clinical records show that at some sessions, the therapist treated Mr. Brooks' levator scapulae with the Graston technique. I accept Ms. Vredenburg's evidence that in 2013, they attended physiotherapy treatments at the same time and were treated side-by-side. She observed that his physiotherapist applied the Graston technique on Mr. Brooks' upper back and shoulder blades.
- [151] The defendants also point to Mr. Brooks' email to the ICBC adjuster on February 7, 2013, to show that whatever neck injury he had sustained in the First Accident had resolved by that point. In the email, Mr. Brooks stated: "I'm still seeing the chiropractor, as my back is still

not back to where it was before the accident, but my neck is good". I am not persuaded, in the context of the evidence as a whole, that this shows that Mr. Brooks' neck had resolved. Mr. Brooks persuasively explained he was managing his neck symptoms with medication, but as time went on, he sought out further treatment, as he was not recovering as he had expected. This is supported by the subsequent clinical records that show that Mr. Brooks continued to report "whiplash" symptoms after February 7, 2013. Moreover, it supports a finding that Mr. Brooks had initially reported an injury to his neck to the adjuster.

- [152] The defendants also take issue with what they assert is the lack of objective evidence supporting Mr. Brooks' injuries.
- [153] In *Butler v. Blaylock*, [1983] B.C.J. No. 1490 (C.A.), the Court of Appeal clarified that "it is not the law that if a plaintiff cannot show objective evidence of continuing injury he cannot recover". Rather, the fundamental consideration in analyzing causation is whether the evidence as a whole establishes on a balance of probabilities that a plaintiff's injuries were caused by the defendant's negligence: *Rabiee v. Rendleman*, 2015 BCSC 595; *Mattson v. Spady*, 2019 BCSC 1144 at para. 108. That said, I am mindful that courts should exercise caution when assessing subjective evidence of injury: *Maslen v. Rubenstein* (1993) 83 B.C.L.R. (2d) 131 (C.A.) at para. 15, citing *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.) at 399.
- [154] Counsel for Mr. Brooks points to some objective markers found in the clinical records that lend support to Mr. Brooks' testimony. In Dr. Chodyra's records on March 2, 2013, Dr. Chodyra found "near" normal range of motion in his neck, but also noted "sensation of tightness on lateral flexion". At the physiotherapy visit on February 20, 2013, the physiotherapist recorded a diminished neck range of motion. On March 7, 2013, the physiotherapist noted "left side limited flexion greater than rotation for cervical spine". To the extent Dr. Douwes contends that he tested range of motion throughout Mr. Brooks' treatments, his findings are inconsistent with those of Dr. Chodyra and the physiotherapist. I find their testing more reliable.
- [155] On March 8, 2013, Dr. Chodyra noted tender trigger points over Mr. Brooks' trapezius muscles and "pain with L neck rotations and bilateral lateral flexion".
- [156] The California physical therapy records, dated August 12, 2013, after recording "signs and symptoms associated with whiplash associated disorder", also record Mr. Brooks with a decreased cervical range of motion. The physical therapist also noted tightness in the right upper trapezius and levator scapulae. The records indicate that the decreased cervical spine range of motion persisted through to September 9, 2013.
- [157] I also accept Dr. Heran's uncontradicted evidence that many patients with a neck injury, although experiencing pain, do not have an impaired range of motion.

[158] The defendants also point to an alleged inconsistency in Mr. Brooks' reporting regarding the onset of his neck symptoms. The clinical records of Dr. Ozgur dated September 16, 2013, themselves contain an internal inconsistency. On the first page of the records, under "Description of Symptoms", it notes that Mr. Brooks' symptoms started "a couple of weeks" after the First Accident. However, in the first paragraph on the same page of the same record, Mr. Brooks is noted as having reported neck pain that began "a few days" after the First Accident. Notably, Mr. Brooks reported that his head was turned to the left at the time of the impact. Counsel for the defendants also attempted to use statements recorded in the August 2013 Core Performance Physical Therapy records to highlight a similar inconsistency. In those records, it is recorded that the "pain gradually came on 2-4 weeks after the injury".

[159] I find that Mr. Brooks' contemporaneous report made four days following the First Accident, as found in Dr. Douwes' clinical records on January 9, 2013, is more reliable than the record of Mr. Brooks reporting an onset symptoms seven to eight months after the First Accident. On January 9, 2013, Mr. Brooks reported "sore neck and upper back since the accident". I accept Mr. Brooks' evidence that he experienced pain symptoms in the base of his neck immediately following the accident and developed pain and stiffness in his neck and upper back in the days following the accident.

[160] Mr. Brooks testified he took chiropractic treatments during the first weeks after his move to California but never sought reimbursement of these expenses because he misplaced the receipts. In the midst of a major move and a new job, I find it plausible that he would not have retained the receipts. I am not persuaded on the evidence on the whole that Mr. Brooks was fabricating his evidence on this point.

[161] The defendants seek to impugn Mr. Brooks' credibility by pointing out that he falsely told Drs. Caillier, Rickards and Hirsch that he did not have a history of back and neck symptoms prior to the First Accident. This assertion is not entirely accurate.

[162] First, in the appendix of Dr. Hirsch's report he stated that:

Mr. Brooks reported that prior to the subject motor vehicle accident he experienced episodic minor pain in his neck and discomfort in his mid back. With respect to these but particular symptoms, he reportedly saw chiropractor every two weeks at most "for maintenance". Mr. Brooks questioned whether his neck and mid back symptoms were caused by his sedentary job.

[163] In Dr. Caillier's report, she indicates that Mr. Brooks had sought treatment by a chiropractor since 2007 for neck and back symptoms "secondary to sustained posturing at work".

- [164] To the extent Mr. Brooks may have indicated to Dr. Rickards that he did not have previous difficulties in his neck and upper back, Dr. Rickards observed that patients will often interpret such questions as asking whether, prior to the accident, they had experienced the same particular problems as they now presented with. In any case, Dr. Rickards' report indicates that he reviewed Dr. Douwes' clinical records in their entirety in formulating his opinion.
- [165] The defence also submits that Mr. Brooks' evidence is unreliable.
- [166] The defendants point out a notation in September 2014 in Dr. Darrington's records of short-term memory issues as well as a notation in August 2017 of issues with concentration and memory. With respect to any alleged memory impairment, I note for the most part, Mr. Brooks has apparently been able to reliably carry out his workplace responsibilities as a supervisor. He also has consistently reported the First Accident as the onset of neck symptoms to the various health professionals he has seen since 2013. Mr. Brooks candidly acknowledged that he continues to have issues with concentration and focus because of his pain.
- [167] Mr. Brooks had a tendency at times to over-dramatize some matters, such as his reaction to some of his physiotherapy treatments in 2013. While I accept that he found the treatments painful, I find it unlikely that he reacted as vociferously as he described them to the Court. During his testimony, Mr. Brooks occasionally struggled to maintain his concentration and remain focused. He candidly acknowledged at trial that he did not "remember every detail" over the five-and-a-half years since the First Accident. At times, he presented as frustrated and distressed over the circumstances in which he finds himself. While I approach his evidence with some measure of caution, I do not believe he reported pain and symptoms that did not exist or that he engaged in any deliberate attempts to mislead the Court. Overall, Mr. Brooks left the court with the impression that he was attempting to answer questions truthfully and accurately. Balancing the evidence as a whole, I am not persuaded that he deliberately or falsely exaggerated matters or embellished the extent of his injuries or the severity of his symptoms to advance his litigation objectives.
- [168] In short, the thrust of Mr. Brooks' testimony is that, given his experience with a prior whiplash injury that had resolved without treatment, he initially believed the neck injury he sustained in the First Accident would resolve. He reported the First Accident to his chiropractor, started treatment, and had an informal discussion with his family doctor. He attempted to manage with chiropractic treatments, but when his condition did not improve, he decided to actively treat his injuries. He continued to see his doctor and sought physiotherapy and chiropractic treatments until he left Canada at the end of June 2013. He had still not improved when he left Canada. Once he arrived in California, and perhaps exacerbated by the move and the absence of regular physiotherapy treatment, he maintains that his condition deteriorated. He therefore sought out what he believed to be appropriate medical treatment.

[169] In the final analysis, despite the testimonial shortcomings, I conclude on the evidence as a whole that Mr. Brooks' overall credibility under oath on these key matters was not successfully impugned. While I find there were frailties and inconsistencies in his evidence, I am not persuaded they were particularly significant in the context of the evidence as a whole. Overall, his testimony accords with the preponderance of the probabilities a reasonable person would recognize in the circumstances of this case.

Conclusion on Mr. Brooks' Condition

[170] In this section I will set out my findings on Mr. Brooks' current condition, including an assessment of the severity of his persisting symptoms. I will address causation in the next section of these Reasons. I also note that since Mr. Brooks is not seeking any compensation for symptoms relating to his shoulder joints, I do not propose to address those symptoms. In any case, he acknowledged that since his shoulder surgeries, 75 to 80% of the symptoms in his shoulder joints have resolved.

[171] The defendants' overarching submission is that Mr. Brooks is exaggerating the severity of his current complaints. According to defence counsel, much of Mr. Brooks' testimony is inconsistent with his prior statements and does not accord with "the preponderance of probabilities which a practical and informed person would readily recognize as reasonable".

[172] Mr. Brooks has seen a multitude of health care professionals and physicians in the more than five years since the First Accident. His reports to them of his history must be viewed through the lens of "the human tendency to reconsider, review and summarize history in light of new information": *Burke-Pietramala v. Samad*, 2004 BCSC 470 at para. 104. In all the circumstances, it is not surprising that some variation can be found between Mr. Brooks' testimony and the entries in the voluminous clinical records, which purport to record his history.

[173] This is a convenient place to note that since the First Accident, Mr. Brooks answered various medical questions regarding the level of his pain. As many courts have observed, pain is an inherently subjective phenomenon. The criteria used by individuals to numerically label the intensity of their pain is not standardized and its quantification is dependent on the descriptions they understand to correspond to each level: *Sooch v. Snell*, 2012 BCSC 696 at para. 75.

[174] Dr. Ozgur's clinical records of September 16, 2013 record "2" as the degree of pain Mr. Brooks was experiencing at the time. I accept Mr. Brooks' evidence that was not his average pain. He understood it to be the level of pain he was experiencing at that particular time, on that particular day. There was no corresponding evidence on what Mr. Brooks understood the pain scale to be, his understanding of the description corresponding to Level 2 or what medication he had taken on that particular day. The documentary evidence does show that Mr. Brooks was taking three prescription medications (anti-inflammatory medication, muscle relaxant medication and Cymbalta) in this period of time. Notably, on the same

clinical record under description of present symptoms it states: "constant pain muscle spasms and hard to do neck side bend to the left".

- [175] In cross-examination, Mr. Brooks credibly asserted that if he had not been experiencing significant symptoms and a significant level of pain in his neck, he never would have consented to major surgery on his cervical spine. Overall, I find no significant discrepancy between his evidence at trial regarding his symptoms and the information he had previously communicated to others.
- [176] Despite having undergone a spinal fusion, multiple treatments, ablations, injections and various therapies recommended by his doctors, as well as attending considerable physical therapy and exercise therapy, the preponderance of the evidence supports a finding that Mr. Brooks continues to suffer from chronic pain. It strikes me as improbable that he would have undergone these multiple treatments and procedures to build up his personal injury claim. Notably, none of the physicians who assessed Mr. Brooks, including the defendants' expert, Dr. Hirsch, have found any amplification of his symptoms or exaggerated pain behaviour.
- [177] Mr. Brooks' primary complaint is persistent pain in his neck and left shoulder blade and spasms of his trapezius muscles. He credibly explained that, for the most part, he has adjusted to his "new normal".
- [178] Balancing the evidence as a whole, I conclude that Mr. Brooks continues to regularly experience significant spasms in his trapezius muscles. He suffers from chronic pain that varies in intensity in his neck and shoulder girdle area, particularly his left shoulder blade. He experiences episodic exacerbations with certain movements of his neck and when undertaking certain activities such as lifting heavy items. He suffers from occasional sleep disturbances because of his discomfort. Mr. Brooks also experiences headaches every month or two, which are occasionally debilitating. I accept Dr. Caillier's opinion that they are cervicogenic headaches. Notably, each of Dr. Caillier, Dr. Hirsch and Dr. Rickards found diminished range of motion in Mr. Brooks' neck upon examination. Dr. Caillier noted tenderness to palpation and muscle spasm particularly involving the left-sided lateral fibres of the upper trapezius and rhomboid muscle spasm in the distal levator scapulae muscle.
- [179] I accept Dr. Caillier's opinion that Mr. Brooks is restricted in activities that require sustained posturing or repetitive head and neck motions as well as heavier based or high impact activities. Although she assessed Mr. Brooks in late 2015, I am satisfied on the totality of the evidence that he continues to have these limitations.
- [180] Mr. Brooks continues to see Dr. Caringi, a pain management doctor. Although Mr. Brooks testified that he has taken various medications at various times, including gabapentin and oxycodone, the evidence was not well developed with respect to his current medication regime. Mr. Brooks continues to take oxycodone for his pain in his neck and shoulder blades, as needed. It is unclear how often he takes the oxycodone but he submits to regular drug testing to ensure that he is not abusing the narcotic. The evidence does not establish if

he currently takes any other medication.

[181] Mr. Brooks also suffers from mildly reduced strength in his right arm and hand.

[182] Mr. Brooks continues to suffer from some discomfort in his jaw and teeth and avoids eating certain foods.

[183] I turn now to Mr. Brooks' psychological condition.

[184] Mr. Brooks relies on Dr. Goldstein's report, which I referred to earlier in these Reasons. Dr. Goldstein diagnosed specific phobia relating to driving and the following psychiatric disorders:

i. Post-Traumatic Stress Disorder

ii. Somatic Symptom Disorder

iii. Adjustment Disorder with mixed disturbance of emotion and conduct

[185] The defence submits that Dr. Goldstein's report should be given no weight because of her "appalling lack of care" in taking Mr. Brooks' history. They also assert that, in light of the fact that limited clinical records were made available to her and the fact that she did not review the records of Mr. Brooks' treating therapists, the validity of her opinions are seriously compromised.

[186] In formulating her opinion, Dr. Goldstein relied, for the most part, on the history Mr. Brooks provided in their clinical interview. She admitted she took no psychiatric history despite being told by Mr. Vredenburg that prior to the First Accident, Mr. Brooks occasionally engaged in hair pulling when he was anxious. The most recent clinical records she was provided were those from April 2014. Further, Dr. Goldstein did not inquire as to whether Mr. Brooks was taking any medication for any psychiatric condition.

[187] Since 2013, Mr. Brooks has been seeing a registered psychologist for counselling sessions in California. As I mentioned, he saw Dr. Aberra and then Dr. Darrington. Dr. Goldstein acknowledged that she did not request an opportunity to review the records of either therapist.

[188] The plain fact is that Dr. Goldstein did not review the clinical notes of either Dr. Aberra or Darrington. During her cross-examination, it emerged that she had not conducted a meaningful review of the clinical records she was provided. These considerations, when viewed cumulatively with the inadequate history she took from Mr. Brooks, lead me to conclude that her evidence lacks the sufficient degree of reliability to be of any real assistance to the court. In the result, I have accorded her opinion little weight.

- [189] That said, the preponderance of the evidence supports the finding that Mr. Brooks continues to suffer from bouts of irritability and increased anxiety. I accept that after the First Accident, Mr. Brooks suffered from moderate anxiety symptoms while driving and that he continues to suffer mild levels of anxiety while driving, depending on the circumstances. He is able to perform his job duties but his ability to concentrate has been negatively impacted.
- [190] Taking into account all of the expert opinion evidence, I have concluded that it is unlikely that Mr. Brooks will make a full recovery. There is a real and substantial possibility that he will undertake further treatments and develop better coping strategies to manage his neck and shoulder symptoms in order to experience some improvement with the intensity and frequency of those symptoms. However, I find it is more likely than not that his symptoms will persist indefinitely. The medical evidence establishes that he has an increased risk for developing progressive arthritic changes in the disc levels above and below the fusion site. I accept Dr. Caillier's opinion that he has an increased susceptibility to worsening of pain should he suffer future trauma to the neck, back and shoulder girdle region.

CAUSATION

- [191] In order to justify any compensation for his condition, Mr. Brooks must establish a causal connection between the defendant's unlawful acts and his current condition. Causation is a central issue in this case. Mr. Brooks submits that he has met the burden of proving that the defendant's negligence caused the constellation of symptoms from which he now suffers, with the exception of his shoulder joint issues. The defence forcefully submits that Mr. Brooks has not discharged his burden.

Proposed Amendment to Response to Civil Claim

- [192] Before turning to the analysis, it is necessary to first address the defendant's application to amend the response to civil claim.
- [193] The response to civil claim was filed October 19, 2016. The trial commenced on June 4, 2018. At trial, after the evidence was closed and during final submissions, the defence indicated that they were seeking an order to amend their response to civil claim to include a plea of novus actus interveniens. There was no suggestion that there should be any opportunity for re-opening the evidence in the case. Mr. Brooks opposed the amendment sought. I reserved my ruling on the amendment application and determined that my ruling would be included in these Reasons. My ruling is set out in the section that follows.
- [194] The defendants submit that if the Court accepts that Mr. Brooks' neck complaints attributable to the First Accident were subsisting at the date Dr. Ozgur recommended and performed the Neck Surgery, Dr. Ozgur's negligence in recommending and conducting the surgery broke the chain of causation between the First Accident and Mr. Brooks' neck symptoms subsequent to the Neck Surgery. In short, the defendants now seek to allege that an intervening act broke the chain of causation such that the defendants should be partially

relieved from paying damages to Mr. Brooks.

[195] The authorities establish that in a personal injury action, negligence in the plaintiff's medical treatment must be specifically pleaded: *Mercer et al. v. Gray*, [1941] 3 D.L.R. 564. The defendants therefore brought an application to amend their pleadings.

[196] The defendants' proposed amendment to the response to civil claim reads as follows:

3. Any alleged injury, loss, damage or expense was not caused by the said motor vehicle accident particularized in paragraph 4 of the Notice of Civil Claim, but is attributable to previous and/or subsequent accidents, injuries or condition involving or affecting the Plaintiff, or congenital defects and/or pre-existing injuries or conditions and the Defendants say further that the alleged collision did not aggravate any pre-existing injury or condition.
4. The Defendants say that the surgery performed to the Plaintiff's neck on or about December 19, 2013 (the "Surgery") was the result of a negligent misdiagnosis, and that the Surgery was unnecessary, inappropriate and negligent and operates as a *novus actus interveniens* that terminates any liability that may have existed on the part of the Defendants for physical or psychological injuries and any damages that may flow from such injuries.
5. The Defendants say that the Plaintiff failed to use reasonable care in the selection of a competent neurosurgeon of good standing and repute, and unreasonably failed to seek a second opinion upon receiving a recommendation for surgery that was contrary to the facts known to the Plaintiff regarding his condition.

[Emphasis in original.]

[197] Pursuant to Rule 6-1(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, a pleading may be amended after the issuance of a notice of trial only with the leave of the court or by consent. Amendments should be allowed if they disclose a reasonable cause of action unless reason exists for their exclusion, such as undue prejudice. Unless actual prejudice can be demonstrated, amendments should be granted liberally in order to enable the determination of the real issues on the merits.

[198] The jurisprudence is clear that amendments may be granted at any time, even after the close of evidence in trial: *Lam v. Chiu*, 2012 BCSC 677. In *Macdonald v. Macdonald Estate* (1996), 21 B.C.L.R. (3d) 379 (S.C.) at para. 40 [Macdonald], the Court provided an instructive distillation of the animating considerations:

- (a) is [the amendment] inconsistent with the pleadings already filed on behalf of the party seeking the amendment;
- (b) is it inconsistent with evidence already tendered by that party and his witnesses at trial and on discovery;
- (c) if it had been asked for at the outset of the trial, would it have changed the whole course of the trial;

- (d) would it be unfair to the opposite party;
- (e) is it necessary for the purpose of determining the real issues raised or depending upon the pleadings?

[199] In the final analysis, whether to allow an amendment is an exercise of judicial discretion. The discretion is not to be exercised arbitrarily and must be informed by the legal principles articulated in the authorities.

[200] The analytical framework in *Macdonald* governs my determination on whether or not to grant the amendment. I will address each of the five factors in turn.

- (i) Is the proposed amendment inconsistent with the pleadings already filed or the evidence rendered?

[201] The original response to civil claim provides as follows:

3. Any alleged injury, loss, damage or expense was not caused by the said motor vehicle accident particularized in paragraph 4 of the Notice of Civil Claim, but is attributable to previous and/or subsequent accidents, injuries or condition involving or affecting the Plaintiff, or congenital defects and/or pre-existing injuries or conditions and the Defendants say further that the alleged collision did not aggravate any pre-existing injury or condition.

[Emphasis added.]

[202] In my view, the proposed amendment is not inconsistent with the existing pleadings.

[203] Furthermore, I cannot conclude that there is an obvious inconsistency between the amendment sought and the evidence tendered at trial. However, if the plea had existed prior to trial, there may have further evidence adduced material to the issue the defendants now propose to raise. Not all the facts necessary to prove medical negligence have been adduced in evidence. I will address this further in the subsection that follows.

- (ii) Would the amendment have changed the whole course of the trial if sought at the outset?

[204] It bears emphasis that the underpinning of a successful plea of *novus actus interveniens* is actionable case in negligence against the subject doctor: *David v. Toronto Transit Commission et al.*; *Zaltz, Third Party* (1976), 16 O.R. (2d) 248. It is well established that in order to meet the standard of care, a physician must exercise the reasonable degree of skill or ordinarily possessed by practitioners in similar communities in similar cases: *Wilson v. Swanson* (1956), 5 D.L.R. (2d) 113 (SCC).

[205] The evidence adduced at trial was based on the existing pleadings.

[206] If the plea had been advanced prior to trial, the trial may have been conducted differently, with potential different witnesses. There may have been different evidence elicited from those witnesses who did testify. Other evidence may have been called, such as evidence as to the standard of care that would apply to Dr. Ozgur in California. While Dr. Paquette

spoke to the Canadian standards, he is not qualified to give any evidence regarding the standards in California. The circumstances in which it may be reasonably prudent for a neurosurgeon to recommend surgery may be very different in California than in British Columbia and Canada. In cross-examination, Dr. Heran, who completed some of his training in the USA, underscored that the medical system in the USA is very different than in Canada. It can reasonably be inferred from his evidence that the threshold for determining when neurosurgery is indicated could be very different in the USA. Moreover, there was no evidence regarding whether in California an error in the diagnosis of a jumped facet joint would constitute an error in professional judgment or would give rise to an actionable claim in negligence.

[207] Even if I were to permit the amendment and Dr. Ozgur was found negligent, the defendants would remain fully liable for any damages arising out of the First Accident that persisted beyond the Neck Surgery: *Dudek v. Li*, 2000 BCCA 321 at para. 16 [Dudek]. If the pleading had existed prior to trial, there may have been more fulsome evidence, and in particular, expert medical evidence, directed at the question of what, if any, damages Mr. Brooks sustained as a result of the Neck Surgery and alleged negligence of Dr. Ozgur (other than the cost of the surgery itself) as distinct from the damages he allegedly sustained in the First Accident.

[208] In sum, if the concept of *novus actus interveniens* had been raised in the pleadings prior to trial, there is a reasonable likelihood that the course of the trial would have changed in a significant way.

[209] As to the second paragraph of amendment sought, if it had been pleaded prior to trial, Mr. Brooks may well have called evidence as to Dr. Ozgur's standing and reputation and likely would have elaborated on his process and criteria in selecting Dr. Ozgur.

(iii) Would the trial be unfair to the opposite party if the amendment is granted?

[210] The application to amend the response to civil claim was brought late in the trial. The timeliness of the request is an important factor. This is a complex claim that Mr. Brooks prosecuted based on the pleadings as they existed prior to trial. To permit the amendment sought by the defendants would clearly result in prejudice to Mr. Brooks. In my view, he would not have been afforded the proper opportunity to meet the case of the alleged medical negligence of Dr. Ozgur. This prejudice cannot be satisfactorily cured at this stage of the proceeding by a costs order or otherwise.

(iv) Is the amendment necessary so the Court can determine the real issues before it?

[211] If the amendment sought by the defendants is granted, the defendants would then be in a position to argue that Dr. Ozgur's negligence broke the chain of causation so that they are partially relieved from compensating Mr. Brooks for all of the damage he suffered. Importantly, however, even if the amendment is not granted, Mr. Brooks must nonetheless prove causation. Mr. Brooks must prove that but for the defendants' tortious act, he would

not have suffered the loss he did. In my view, this is a principal issue in the case regardless of whether or not the amendment is granted.

[212] In considering whether or not to grant the application, I must balance the competing interest of the parties and weigh the relative prejudice that may be visited upon them in either granting or denying the application for the amendment. I must determine where the greater prejudice falls and balance that tension with the goal of conducting a fair trial so that justice can be done between the parties.

[213] In weighing the relative prejudice to the parties, I have concluded that the greater prejudice falls to Mr. Brooks in not having a fair opportunity to meet the allegations of the alleged negligence of Dr. Ozgur as well as meeting the allegation that Dr. Ozgur was not of "good standing and repute". That prejudice militates against permitting the amendment.

[214] All things considered and applying the Macdonald factors, I am not persuaded that it is in the interests of justice to permit the amendment sought. The application is dismissed.

Legal Framework - Causation

[215] The parties' dispute engages a number of well-settled principles of tort law regarding causation.

[216] In order for Mr. Brooks to recover damages there must be a causal link between the First Accident and his injuries. He must prove that the defendants' negligence was causative, both in fact and law of the damage he sustained: *Kallstrom v. Yip*, 2016 BCSC 829 at para. 316 [Kallstrom].

[217] Whether a defendant is liable to a plaintiff for an injury is a matter of causation. The amount of compensation the defendant must pay is a matter of assessment of damages. It is important to keep in mind the analytical distinction between determining causation and assessing damages, since different principles govern the two questions: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para. 16 [T.W.N.A.]; *Moore v. Kyba*, 2012 BCCA 361 at paras. 35-36 [Moore].

[218] In *Blackwater v. Plint*, 2005 SCC 58 at para. 78, Chief Justice McLachlin provided an instructive distillation of the principles that inform the analysis of causation in tort and those pertinent to the assessment of damages:

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

- [219] The "thin skull" and "crumbling skull" doctrines relate to the assessment of damages in tort. The animating principles were reviewed in *Athey v. Leonati*, [1996] 3 S.C.R. 468 [Athey]:
- [34] The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.
- [35] The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: *Cooper-Stephenson*, supra, at pp. 779-780 and *John Munkman, Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke*, supra; *Malec v. J. C. Hutton Proprietary Ltd.*, supra; *Cooper-Stephenson*, supra, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.
- [Emphasis in original.]
- [220] The Court of Appeal in *T.W.N.A.* reviewed the principles articulated in *Athey* and clarified that a defendant need not prove on a balance of probabilities that a plaintiff's pre-existing condition would have actually caused a loss. If the evidence demonstrates a "measurable risk" or "realistic chance" that the plaintiff's pre-existing condition would have resulted in a loss regardless of the defendant's negligence, damages should be reduced accordingly. The contingency should be given weight according to its relative likelihood: *T.W.N.A.* at para. 48; *Kallstrom* at paras. 322-325.
- [221] I will return to the principles that govern the assessment of damages later in these Reasons in the section on damages.
- [222] The primary test to be applied in determining causation is commonly articulated as the "but for" test. The plaintiff bears the burden of showing that "but for" the negligent act or omission of the defendant, the plaintiff's injury would not have occurred. The "but for" test is not to be applied too rigidly and need not be determined with scientific precision. Rather, causation is a practical question of fact which can be best answered through the application of ordinary common sense: *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328.

- [223] When assessing medical evidence, the court must be mindful that in the legal context, the "but for" test need only be established on a balance of probabilities; a plaintiff must show that it is more likely than not that, without the tort, the injury or medical condition would not have occurred. In contrast, medical experts often endeavour to apply a far more rigorous causation standard that approximates the threshold of scientific certainty: *Midgley v. Nguyen*, 2013 BCSC 693 at para. 172 [Midgley]; *Woelders v. Gaudette*, 2016 BCSC 1066 at para. 116 [Woelders].
- [224] The Court in *Tsalamandris v. MacDonald*, 2011 BCSC 1138 at paras. 145-146, var'd on other grounds, 2012 BCCA 239, provides the following instructive caution regarding the assessment of medical evidence:
- [144] Because the "but for" test is to be proved on a balance of probabilities, rather than a standard of scientific certainty, great care must be had in assessing medical evidence
- [145] In determining causation in the legal context, courts must be mindful to assess the import and substance of the expert opinion evidence, and to be cautious about the wording used by the experts so as to not unduly discount or over-weigh the expert's choice of language when describing medical causation. Ultimately causation is a question for the court, taking into account the evidence.
- [146] It is important for the court to keep in mind that all that is required to determine these complex medical issues in the context of causation is for the plaintiff to prove what is more likely than not. This is what is meant by the "but for" test: it is more likely than not, that without the tort, the injury or medical condition would not have happened.
- [Emphasis added.]
- [225] It follows that for purposes of causation, the "but for" test does not require the court to accept or find a particular medical diagnosis: *Scott v. Erickson*, 2009 BCSC 1298 at para. 69; *Woelders* at para. 116. The Supreme Court of Canada in *Saadati v. Moorhead*, 2017 SCC 28 [Saadati], endorsed the notion that claimants alleging physical injury are not required to show that their condition carries a certain classificatory label or a medically recognized diagnosis.
- [226] A plaintiff need not establish that a defendant's tortious conduct is the sole cause of the injury. As long as the plaintiff establishes a substantial connection between the injuries and the defendant's negligence beyond the de minimus range, a defendant will be fully liable for the harm suffered, even if other causal factors, for which the defendant is not responsible, were at play in producing the harm. Put another way and to the same effect, apportionment does not lie between tortious causes and non-tortious causes of injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he or she is not responsible also helped to produce the harm: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9 and 11; *Athey; Resurice Corp. v. Hanke*, 2007 SCC 7; *Clements v. Clements*, 2012 SCC 32.

- [227] The court must be cautious when inferring causation from a temporal sequence; that is, from a consideration of pre-accident versus post-accident condition. In cases where causation is asserted primarily on a temporal relationship between the negligent conduct and injury in question, the authorities mandate that a "close scrutiny of the evidence is required because the inference from a temporal sequence to a causal connection is not always reliable": *Hardychuk* at para. 130; see also: *Madill v. Sithivong*, 2012 BCCA 62 at para. 20; *White v. Stonestreet*, 2006 BCSC 801 at paras. 74-75. However, the authorities recognise that temporal reasoning is not an illegitimate analysis if invoked in the appropriate circumstances: *Erickson v. Sibble*, 2012 BCSC 1880 at para. 223 [*Erickson*].
- [228] In light of the fact that Mr. Brooks was involved in three accidents, the issue arises as to whether the injuries he sustained are divisible or indivisible as between the accidents. Divisible injuries are those capable of being separated out and having their damages assessed independently. Indivisible injuries are those that cannot be separated such that division is neither possible nor appropriate: *Bradley v. Groves*, 2010 BCCA 361 at para. 20 [*Bradley*]; see also *Athey* at paras. 22-25.
- [229] In *Chappell v. Loyie*, 2016 BCSC 1722 [*Chappell*], Madam Justice Fisher (when she was a member of this Court) summarized the legal concepts of divisible and indivisible injuries:
- [7] In short, the essential purpose of tort law is to restore the plaintiff to the position he would have enjoyed but for the negligence of the defendants.
- [8] It is not permissible to apportion liability between tortious and non-tortious causes, as the plaintiff would not be adequately compensated. However, where there are multiple causes of a plaintiff's injuries, the key factual question is whether the injuries are divisible or indivisible. Divisible injuries are those that can be separated so that their damages can be assessed independently. Indivisible injuries are those that cannot be separated: *Bradley v. Groves*, 2010 BCCA 361 at para. 20.
- [9] If the injury is divisible, a plaintiff can recover from the defendant only the damages attributable to the injury caused or contributed to by that defendant. If the injury is indivisible, a plaintiff can recover from the defendant 100% of the damages attributable to the injury caused or contributed to by that defendant regardless of the contribution to the injury by others: *Athey*, at para. 24; *Bradley*; *B.P.B. v. M.M.B.*, 2009 BCCA 365 at para. 33; see also *E.D.G. v. Hammer*, 2003 SCC 52 at paras. 29-33.
- [230] In *Bradley* at para. 37, the Court of Appeal also clarified that "indivisibility" and aggravation of a pre-existing injury are not qualitatively different:
- [37] We are also unable to accept the appellant's submission that "aggravation" and "indivisibility" are qualitatively different, and require different legal approaches. If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not

automatically implicate a thin or crumbling skull approach (as in *Blackwater*), if the injuries cannot be distinguished from one another on the facts. Those doctrines deal with finding the plaintiff's original position, not with apportioning liability. The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the "but for" approach to causation endorsed by the Supreme Court of Canada in *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333. As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a "but-for" test, as "there is more than one potential cause in virtually all litigated cases of negligence" (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.

[Emphasis added.]

- [231] At the causation stage of the analysis, the characterization of injury or injuries as divisible or indivisible is relevant to determining what the defendant is liable for. In assessing damages, the divisible/indivisible characterization is relevant to the question of the amount of compensation the defendant must pay to the plaintiff: *Moore* at paras. 37 and 41.
- [232] The Court of Appeal in *Bradley* underscored that indivisible injuries, whether occasioned by a combination of non-tortious and tortious causes, or solely by tortious ones, result in joint liability to the plaintiff. The Court of Appeal went to state, at para. 34, that the tortfeasors' right to seek contribution and indemnity from each other and the ultimate apportionment as between themselves "is a matter of indifference to the plaintiff".

Discussion

- [233] Mr. Brooks' overarching submission is that his medical problems were occasioned by a combination of both non-tortious (the Neck Surgery) and tortious causes (the First and Second Accidents). His counsel underscores that it is not necessary for Mr. Brooks to establish that the First Accident was the sole cause of his injuries and related losses. It is sufficient for the defendants to be liable if the First Accident is part of the cause of Mr. Brooks' injuries. If so, the defendants are liable for the entire amount of his loss, excepting only those items that can be specifically allocated to the Second Accident.
- [234] Mr. Brooks submits that he was more susceptible to sustaining an injury to his neck due to his congenital abnormality and that this renders him a "thin skull" plaintiff. He contends that the combined effect of his neck position on impact and his congenital neck issues caused injuries beyond that which might ordinarily be expected in the First Accident.
- [235] The defendants counter with the submission that the condition of Mr. Brooks' neck and upper back when he consulted Dr. Park in August 2013 was the result of an aggravation of his longstanding neck and back complaints and was not related to the First Accident. They assert that Mr. Brooks has failed to prove that he sustained any injury in the First Accident

and, in the alternative, if he did sustain an injury, it had resolved by the time he moved to California. They contend that by June 2013, he had returned to "his pre-accident baseline of chronic neck and back complaints" and that his pre-accident condition was exacerbated by the move, stress, poor ergonomics at work and a lack of physical therapy.

[236] In addressing the defendants' submissions, first I observe that there is no legal principle that holds that in a low impact collision or a collision that results in no significant damage to a motor vehicle, the individual seated within that vehicle at the time of the impact cannot have sustained injuries. The authorities clearly establish that, while the severity of the impact may be a relevant consideration, the extent of the injuries suffered by a plaintiff is not to be measured by the severity of the force in a collision or the degree of the vehicle's damage. Rather, the existence and extent of a plaintiff's injuries is to be determined on the basis of the evidentiary record at trial: *Gordon v. Palmer* (1993), 78 B.C.L.R. (2d) 236.

[237] In *Greenway-Brown v. MacKenzie*, 2019 BCCA 137 at para. 27, the Court of Appeal recently affirmed that:

"the presence and extent of injuries are to be determined on the basis of evidence" without reference to assumptions about the relationship between vehicle damage and impact, and personal injury.

[238] As I set out earlier, I accept that Mr. Brooks' head was turned to the left at the time of impact. I also accept that as far as he was concerned, the collision was jarring, the base of his head hurt immediately following the collision and over the following days, he developed pain and stiffness in his neck, upper back and shoulder girdle. This is consistent with what he reported to Dr. Douwes on January 9, 2013. The evidence also shows that prior to February 7, 2013, Mr. Brooks had reported neck symptoms to the ICBC adjuster. I accept that in the weeks following the First Accident, Mr. Brooks experienced what he described as "whiplash feeling" of stiffness and pain in his neck.

[239] Dr. Rickards explained to the Court that the medical literature supports the notion that if the neck of a person injured in a low-impact collision is rotated at the time of injury, it can result in added injury. I accept his evidence on this point. The defence led no opinion evidence to support the assertion that the force of impact in the First Accident was incapable of producing the injury alleged by Mr. Brooks.

[240] In their submissions, the defendants also relied on the trial decision in *Greenway-Brown v. Kyung*, 2018 BCSC 287 [Greenway]. The trial judge referred to the principles formulated in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 [Mustapha], wherein the Supreme Court of Canada held that a plaintiff's psychiatric injury was too remote to permit recovery. The trial judge in *Greenway* reasoned that the *Mustapha* principles applied to claims for physical injury.

- [241] While the decision in this matter was on reserve, the plaintiff's appeal of the trial decision in Greenway was allowed. The Court of Appeal held that the trial judge erred in applying the Mustapha principles to physical injuries sustained in a motor vehicle accident where negligence has been established. The Court of Appeal held that the principles in Mustapha cannot be translated to a requirement that physical injury allegedly sustained by a plaintiff in negligence claim must be serious and prolonged to constitute injury that is legally compensable: at paras. 74-89. Further, the Court of Appeal clarified that, with respect to causation at law, it is reasonably foreseeable that a plaintiff in a minor motor vehicle accident can sustain physical injuries that lead to chronic pain and psychological issues: at paras. 90-94.
- [242] Balancing the evidence as a whole, I am satisfied that, although the damage sustained to his vehicle was minimal, Mr. Brooks sustained an injury to his neck and upper back in the First Accident. I will address his shoulder injury separately. I summarize my findings as follows:
- (i) As I stated earlier, Mr. Brook's head hurt at the base of his skull immediately following the First Accident and, over the next few days, he developed increasing stiffness and pain in his neck and upper back. To be clear, I reject the defence submission that Mr. Brooks' pain symptoms manifested two-to-four weeks after the First Accident. Such a finding does not accord with the weight of the evidence or the preponderance of the probabilities in this case.
 - (ii) Mr. Brooks initially managed his symptoms with over-the-counter medication and chiropractic treatments.
 - (iii) When his injury did not improve as he anticipated, Mr. Brooks consulted his family doctor. From March 2, 2013 to June 19, 2013, Mr. Brooks saw Dr. Chodyra five times regarding his injuries. She recommended physiotherapy treatments and prescribed anti-inflammatory and muscle relaxant medication. He underwent physiotherapy treatment for his injuries.
 - (iv) Although Mr. Brooks had regularly seen Dr. Douwes for chiropractic treatments for his work-related symptoms prior to the First Accident, the preponderance of the evidence I accept supports a finding that after the First Accident, Dr. Douwes treated a new and acute injury. Dr. Douwes confirmed that after the First Accident, Mr. Brooks' muscles in his neck and upper back were more sensitive on palpation during treatment. In his initial report to ICBC, Dr. Douwes diagnosed a Grade II neck / upper back muscle injury. He also noted pain on extension and flexion in the cervical and thoracic spine and palpatory tenderness in the cervical and thoracic spine. He also noted that Mr. Brooks previously had cervical and thoracic subluxations that "should have minimal impact on present injury". The frequency of Mr. Brooks' chiropractic treatments increased after the First Accident.
- [243] In short, I conclude that Mr. Brooks sustained an injury in the First Accident in spite of the fact that the collision caused minor damage to his vehicle.

- [244] In the months following the First Accident, Mr. Brooks' symptoms fluctuated in intensity to some minor extent but, balancing the evidence as a whole, I am satisfied that his symptoms persisted.
- [245] Balancing the evidence as a whole, I also find that that the injuries Mr. Brooks sustained in the First Accident had not resolved by late June 2013, when he moved to California. He remained symptomatic from the injuries he sustained in the First Accident. This is a fundamental flaw that underpins the defendants' submissions on causation.
- [246] On several occasions up to and including June 2013, Mr. Brooks continued to complain of his accident-related symptoms to his doctor, his physiotherapist and his chiropractor. In making my findings, I have considered the following evidence:
- (i) Mr. Brooks did not miss any days of work on account of his injuries.
 - (ii) In June, before he left for California, Mr. Brooks went to see his family doctor, Dr. Chodyra, with ongoing neck, upper back and shoulder pain from the First Accident. She recommended continuing with a rehabilitation program and renewed his prescription medications. She diagnosed soft tissue injury.
 - (iii) On June 27, 2013, the physiotherapist who had been treating his cervical and thoracic spine injuries noted that Mr. Brooks would likely require additional physiotherapy after he completed the move.
 - (iv) Dr. Douwes notes in his chiropractic clinical records that on June 19, Mr. Brooks continued to report "sore neck from whiplash". In his discharge report dated June 26, 2013, Dr. Douwes also noted palpatory tenderness on examination of Mr. Brooks' cervical and thoracic spine.
 - (v) Mr. Brooks underwent trigger point injections before he left for California that he did not find effective.
 - (vi) I accept Mr. Brooks' testimony that prior to the move, his whiplash injury was unresolved and that his symptoms were not improving. He was continuing to experience pain and stiffness in his neck, upper back, and shoulders. His activities were restricted on account of his symptoms.
- [247] Although Mr. Brooks and his wife hired professional movers, I find it more likely than not that Mr. Brooks' symptoms arising from the neck and upper back injuries he sustained in the First Accident were exacerbated by driving to California, the stress and activities associated with the move and the absence of his regular physiotherapy sessions that he had been attending in B.C. On balance, I find that Mr. Brooks initially attempted to lift a few heavy boxes in California but found the lifting too painful. He developed shooting pains from his neck into his shoulders when he did any lifting.

- [248] Once his health benefits from his new employment became effective, Mr. Brooks arranged to see Dr. Park, a primary care physician in California, on August 3, 2013. Dr. Park prescribed three different types of medication, recommended physiotherapy and ordered imaging of his neck and upper back. It can reasonably be inferred that Mr. Brooks presented with fairly acute neck and upper back symptoms.
- [249] In my analysis of causation, I have considered that prior to the First Accident, Mr. Brooks suffered from some neck and upper back symptoms. He had seen his chiropractor, Dr. Douwes, since 2007 for what he described as "maintenance treatments". Mr. Brooks attributed his prior chiropractic treatments to his poor posture and sedentary employment. While there were notations of treatments for "sore neck" in Dr. Douwes' records, many of his treatments were associated with his mid-back. Mr. Brooks generally found the treatments effective on a short-term basis. In February 2013, he initially sought out physiotherapy treatments with the objective of strengthening his postural muscles that would result in more long-term relief. I have not overlooked that in the summer of 2012 Mr. Brooks attended 10 physiotherapy sessions to treat mid-back, elbow and hand issues as well as issues with his calf muscles that he attributed to the postural problems associated with his sedentary employment. He credibly explained that he wanted to make use of his extended health benefits before moving to the USA and that he was seeking treatment that would be longer lasting than the relief his chiropractic treatments provided. I do not find the fact that in July 2012 he had an intramuscular stimulation ("IMS") treatment on his neck significant in the context of the evidence as a whole.
- [250] Significantly, in my view, in the 18 appointments Mr. Brooks had with Dr. Chodyra, his family doctor from 2008 to until 2013, he never reported any neck or upper back complaints. Moreover, prior to the First Accident, any neck and upper back symptoms did not interfere with his lifestyle. I accept his evidence that his condition did not curtail his recreational pursuits or activities. He performed all his considerable household responsibilities without any difficulties. Prior to the First Accident, he had managed to move households twice without any difficulties. He enjoyed an intimate relationship with his wife. Furthermore, the evidence does not demonstrate that he ever took medication, over-the-counter or prescription, to alleviate any of his neck and back symptoms prior to the First Accident. Finally, I accept his evidence that his neck and back symptoms for which he sought chiropractic treatment prior to the First Accident were "more discomfort than pain" and not comparable to the more intense pain he experienced after the First Accident.
- [251] Earlier in these Reasons, I set out the progression of Mr. Brooks' symptoms after the First Accident and the ways in which those symptoms impacted him. Balancing the medical and lay evidence as a whole, I find that it is more likely than not that after the First Accident, his neck and upper back symptoms were more intense and more persistent than before. The chiropractic treatments he underwent after the Accident were also less effective.

- [252] The defendants submit that the enquiry into causation is completely confounded by the absence of any opinion evidence prior to the advent of the Second Accident and the Surgery, such that it is impossible for any experts or the Court to conclude on a balance of probabilities that the symptoms of which the plaintiff has complained since the Second Accident and the Surgery are attributable to the First Accident.
- [253] In making this submission, it is my view that the defendants have, to some degree, misapprehended the causation principles of tort law that I discussed earlier in these Reasons. It is not necessary for Mr. Brooks to establish that the First Accident was the sole cause of his condition and related losses. At the causation stage of the analysis, the defendants are liable for all injuries caused or contributed to by their tortious conduct. There is no basis for a reduction of liability because of the existence of other contributing causes of an indivisible injury.
- [254] Beyond Dr. Hirsch's general remarks that the symptoms Mr. Brooks experienced after the First Accident were similar to those he experienced prior to the accident, there was no cogent medical evidence regarding the predictable natural path of Mr. Brooks' pre-existing neck and upper back condition, had there been no First Accident. There was no evidence as of what age those symptoms might have worsened, how serious or disabling they may have become, or how rapidly they would have progressed. Although Dr. Caillier fairly acknowledged in cross-examination that lifting boxes and other activities could result in an aggravation of pre-existing neck and upper back symptoms, the medical evidence falls short of establishing that Mr. Brooks would have become as symptomatic as he did absent the First Accident.
- [255] Dr. Hirsch opined that Mr. Brooks had sustained minor soft tissue injury in the First Accident from which he had recovered in a few weeks and in the worst-case scenario by February 2013. It was also his opinion that Mr. Brooks did not sustain any significant structural damage to his neck in the First Accident. Dr. Hirsch's opinion is founded on his conclusion that the symptoms Mr. Brooks experienced after the First Accident were similar to those he experienced prior to the accident. However, as I stated earlier, the totality of the evidence I accept supports the finding that Mr. Brooks' post-accident condition was not the same as pre-accident. Moreover, I have also concluded that his injury from the First Accident had not resolved by February 2013.
- [256] Dr. Hirsch made no mention in the body of his opinion that Mr. Brooks had reported his injury to Dr. Douwes on January 9, 2013, or that the frequency of his chiropractor treatments increased after the First Accident. Nor did Dr. Hirsch address the fact or consider that Mr. Brooks continued to complain of symptoms relating to the First Accident well past February 2013. In his opinion, Dr. Hirsch points out that Mr. Brooks did not complain of neck pain when he was assessed by his physiotherapist in February 2013. However, the clinical assessment notes of the physiotherapist show a diagram of Mr. Brooks' neck and upper back with a corresponding notation of "achy/sore". When he prepared his report, Dr. Hirsch did not have the records of the physical therapist in

California who treated Mr. Brooks in August 2013 and recorded reduced cervical range of motion and tightness in the right upper trapezius and levator scapulae.

- [257] When the appointments with his doctors, physiotherapist treatments and the objective findings of limited range of motion after February 2013 were pointed out to him in cross-examination, Dr. Hirsch offered that Mr. Brooks may not be exerting full effort in the range of motion testing. Overall, I did not find his explanation for Mr. Brooks' ongoing and significant symptoms after February 2013 to be persuasive. He strongly implied that because Mr. Brooks had not made an appointment to see Dr. Chodyra about his injury until March 2, 2013, he simply did not believe Mr. Brooks' pain complaints arose from the First Accident.
- [258] In my view, the degree of skepticism Dr. Hirsch demonstrated in his testimony together with the aspects of his report I have outlined above, revealed a lack of the sufficient degree of objectivity expected of an expert witness. All things considered, I do not consider it safe for the Court to rely on Dr. Hirsch's opinion on causation.
- [259] The other medical evidence adduced by the defence does not assist the defence and does not disprove the connection between the First Accident and Mr. Brooks' injuries. In fact, Dr. Paquette, a highly qualified neurosurgeon who was called by the defence, opined that Mr. Brooks likely sustained a soft tissue injury to his neck in the First Accident resulting in increased neck and back pain. I found Dr. Paquette to be objective in his testimony.
- [260] After opining that surgical treatment was not indicated for his injuries, Dr. Paquette went on to opine that Mr. Brooks' recovery from his soft tissue injury "did not have a chance to run its course" as "a subsequent accident and then surgical intervention have skewed his clinical outcome". In his testimony, he forthrightly acknowledged that Mr. Brooks was injured in the First Accident. He explained that he used the term "soft tissue injury" because the radiographic studies did not show any structural damage to his spine. The thrust of his opinion was that the recovery of that injury was interrupted by the Second Accident and the Surgery. Dr. Paquette also fairly acknowledged in cross-examination that it was possible that the First Accident rendered Mr. Brooks' congenital spinal abnormality symptomatic.
- [261] Dr. Heran, who is also a well-qualified neurosurgeon, was called by Mr. Brooks. I found Dr. Heran to be a careful and objective witness. It was clear from his testimony that he had conducted a very thorough review of Mr. Brooks' clinical records. He demonstrated an impressive recall of the details of these records.
- [262] Based on his review of the chiropractic records prior to the First Accident, he noted that although there were various references to "sore neck", the dominant source of his symptoms was his mid-back.

- [263] Dr. Heran diagnosed Mr. Brooks as having sustained myofascial injuries in the neck and upper back and as experiencing mechanical neck pain likely arising from structural spinal elements in the vicinity of the C5-C6 level. In formulating his opinion that surgery was a reasonable option, Dr. Heran opined that Mr. Brooks' injury arose as a consequence of the First Accident. He persuasively explained that Mr. Brooks' "grossly abnormal cervical spine" predisposed him to having a structural source of pain. He described it as a "big red flag". He also opined that the pain relief that Mr. Brooks experienced with the facet joint blocks and ablations is consistent with a mechanical source of pain arising from a neck and facet joint injury. He fairly acknowledged in cross-examination that there was no evidence in the imaging of any damage to Mr. Brooks' spine. He went on to explain that the majority of patients with facet joint trauma will have no imaging correlates.
- [264] To the extent the defence alleges that, prior to his move to California, Mr. Brooks' condition worsened in the first months following the First Accident, they have not suggested a plausible alternative traumatic event that would explain his symptomology. Dr. Heran explained in cross-examination that, in the absence of an additional traumatic event, the cause would likely be the progressive deterioration at the site of the original damage caused by the First Accident. Dr. Rickards also stated that symptoms will wax and wane when a patient has a facet joint injury.
- [265] Dr. Caillier opined in her comprehensive report that in the First Accident Mr. Brooks sustained a soft tissue musculoligamentous injury involving his neck, upper back and posterior shoulder girdle regions. In her opinion, the First Accident rendered the congenital abnormalities at C5/6 in his spine symptomatic. Dr. Caillier opined that but for the First Accident, as well as aggravated by the Second Accident, Mr. Brooks would likely not have experienced the symptomatic complaints involving his neck, shoulder blades and upper back that he has. She assumed that, while his history of neck and upper back symptoms for which he sought chiropractic treatment increased his risk of developing pain as a result of a traumatic event, it did not limit or restrict his ability to engage in activities of his choosing. This assumption harmonizes with the preponderance of the evidence I accept and the preponderance of the probabilities in this case. She also acknowledged that Mr. Brooks' spinal congenital abnormality could have contributed to some of his symptoms prior to the First Accident, but she underscored that his symptoms after the First Accident were more constant and intense.
- [266] The defendants seek to undermine Dr. Caillier's opinion, suggesting that her testimony reflected a significant element of advocacy. I do not see it that way. In cross-examination she conceded matters she may have inadvertently overlooked in her assessment. Overall, I found her to be sincere in her efforts to convey to the Court the complexity and nuance of accurately assessing and diagnosing patients who present with persistent pain and other symptoms. The fact that Mr. Brooks was involved in the Third Accident after Dr. Caillier's assessment does not undermine her opinion on causation.

- [267] Overall, in my view, neither Dr. Caillier's nor Dr. Heran's opinions on causation of Mr. Brook's neck and upper back condition were undermined in the face of a thorough cross-examination. I am also satisfied that the information regarding Mr. Brooks' symptoms relied on by Dr. Heran, Dr. Paquette and Dr. Caillier in formulating their opinions on causation harmonizes with the preponderance of the evidence I accept and the probabilities of this case: *Mazur v. Lucas*, 2010 BCCA 473 at para. 40.
- [268] Dr. Rickards diagnosed Mr. Brooks with a probable cervical facet joint syndrome suggestive of irritation of the facet joints and opined that it was caused by the First Accident. He also opined that the clinical records suggest that there was a congenital anomaly at C5/6 with "a MVA related injury to the bony structure of C6".
- [269] When defence counsel put to Dr. Rickards in cross-examination that Mr. Brooks had attended five physiotherapy treatments in February 2013, prior to any treatments focusing on his accident-related back and neck complaints, Dr. Rickards stated that he would be unable to discern what symptoms were treated in the later physiotherapy sessions. In re-direct examination, Dr. Rickards clarified that Mr. Brooks could have two separate issues, in the sense that he could have initially seen the physiotherapist for work-related mid-back complaints, and then in the later visits focused on neck and upper back pain associated with the First Accident.
- [270] Balancing the evidence as a whole, I do not accept the defence's position that there is an absence of a causative link between the First Accident and Mr. Brooks' subsequent symptoms. I am satisfied on a balance of probabilities that the injuries Mr. Brooks sustained in the First Accident had not resolved by February 2013 or, for that matter, by the time he first saw Dr. Park in early August 2013 or Dr. Ozgur in September 2013. He continued to suffer from symptoms from the injuries he had sustained in the First Accident.
- [271] I recognize the dangers inherent in applying temporal reasoning in determining causation. However, when the timeline of the pertinent events is scrutinized in the context of the totality of the evidence, the inference of causation is compelling.
- [272] Ultimately, causation is a question for the Court taking into account all of the evidence. It bears emphasis that the Court need not be satisfied that there was causation on the basis of scientific precision or proof.
- [273] For the reasons already expressed, I place little weight on Dr. Hirsch's opinion on causation. Based upon the other medical evidence in conjunction with the other evidence I accept, I conclude that in the First Accident, Mr. Brooks sustained an injury to his neck and upper back which caused him to experience persistent pain symptoms. It is not necessary, from a legal perspective, for the Court to determine a medical diagnosis, precise description or label for the spine injury he sustained. It does not matter for the Court's purposes whether the First Accident caused myofascial or musculoligamentous injury or structural damage to the spinal elements.

- [274] In summary on this issue, I have concluded that Mr. Brooks has met the "but for" test mandated in the authorities. I am satisfied that it is more likely than not that he sustained an injury to his neck and upper back in the First Accident. Mr. Brooks' constellation of symptoms in these areas and the associated chronic pain, headaches and disturbed sleep would not have manifested themselves as they did but for the First Accident.
- [275] I also find that the weight of the evidence that I accept supports a finding that Mr. Brooks sustained an injury to his shoulder blades and the intrascapular region in the First Accident that I will refer to as the shoulder girdle. I am satisfied there is a substantial connection between his shoulder blade injury and the First Accident beyond the de minimis range.
- [276] In a standard form pain questionnaire that Mr. Brooks filled out in 2014, wherein he listed muscle pain, neck pain and joint stiffness as issues, he listed his chief complaint as shoulder pain. In the pain diagram he completed, he indicated pain in the top and front of his shoulders and his shoulder blades. As I stated, Mr. Brooks in this proceeding is not asserting that the First Accident caused any issues with the shoulder joints. He attributes his shoulder joint issues to the Second Accident. The defendants made much of the fact that in the questionnaire Mr. Brooks indicates that the pain in his shoulder started as of the date of the Second Accident.
- [277] In cross-examination, Mr. Brooks credibly explained that he had experienced pain in his shoulder blades following the First Accident. This is supported by his physiotherapy records in 2013, which showed treatment in the rhomboid and levator scapulae muscles that attach to the shoulder blade. These are the treatments he found painful. Furthermore, Dr. Chodyra's clinical notes record the following observations:
- March 2, 2013 - TTP over posterior shoulders supraspinatus area
- March 8, 2013 - TTP over trapezius muscles
- [278] Supraspinatus and trapezius muscles also attach to the shoulder blade.
- [279] I also note that in her cross-examination Dr. Caillier did not resile from her opinion that the First Accident contributed to Mr. Brooks' shoulder blade issues. She merely acknowledged that, based on the pain questionnaire, Mr. Brooks appeared to attribute the Second Accident as the main reason for his shoulder problems.
- [280] In any case, I am satisfied on the totality of the evidence that it is more likely than not that Mr. Brooks sustained an injury to his shoulder girdle, including the intrascapular region, in the First Accident. The Second Accident likely also contributed to his shoulder blades' symptoms however, Mr. Brooks need not establish that the First Accident was the sole cause of the shoulder girdle injury.
- [281] In order for Mr. Brooks to recover damages for his right sided C6 radiculopathy, which is nerve root compression or injury, he must establish a causal link with the First Accident. He must prove that the defendants' negligence was causative, both in fact and law, of the

damage he sustained. On the totality of the evidence, Mr. Brooks has not proved on a balance of probabilities the cause of his right sided C6 radiculopathy. The totality of the evidence, including the expert medical evidence, is insufficiently clear for me to come to a reliable conclusion as to causation.

[282] As far as Mr. Brooks' jaw pain, in the absence of any pertinent clinical records pre-dating the First Accident and expert medical evidence on the point, I cannot conclude that Mr. Brooks has met the legal threshold for establishing that the First Accident caused him jaw and dental discomfort and pain.

[283] Similarly, given my findings on Dr. Goldstein's report, I cannot conclude that Mr. Brooks has proved that the First Accident caused him to suffer a mental injury or that he currently suffers from a mental injury. While recognizing that recovery for a mental injury does not require proof of a recognizable psychiatric illness, Mr. Brooks has not proven that he suffers from PTSD, an adjustment disorder, or somatic symptom disorder: Saadati at para. 2. However, I accept that the First Accident caused Mr. Brooks to suffer from anxiety relating to driving, and exacerbated his pre-existing anxiety symptoms; his distress also imposed additional stress on his marriage.

The Neck Surgery

[284] The next step in the analysis is to consider the legal relevance of the Neck Surgery.

[285] Mr. Brooks contends that the defendants are liable for any injuries caused or contributed to by their negligence and that the presence of the Neck Surgery as a non-tortious contributing cause does not reduce their liability.

[286] The defendants counter with a submission that, should the Court find that Mr. Brooks continued to suffer the effects of the First Accident at the time of the Neck Surgery, the Neck Surgery resulted from a negligent misdiagnosis that breaks the chain of causation, such that the defendants are not responsible for any damages that allegedly flow from the Neck Surgery.

[287] The law is clear that if an injured plaintiff acts unreasonably, he cannot hold a defendant liable for injury caused by his own unreasonable conduct: Dudek at paras. 11-13.

[288] If a plaintiff in a personal injury action acts reasonably in seeking advice from a qualified doctor to treat his or her injuries and suffers loss or damage because of an error in medical treatment, the defendant tortfeasor remains responsible for any further loss or damage sustained. Put another way and to the same effect, any loss or damage sustained as a result of the error in the medical treatment is properly compensable. To the extent the defendants' submission requires consideration of foreseeability, I find that it is reasonably foreseeable that an injured person who seeks medical treatment may suffer loss or damage because of error in medical treatment: *Watson v. Grant*, [1970] 72 W.W.R. 665, [1970] B.C.J. No. 41 (B.C.S.C); *Mercer et al. v. Gray*, [1941] O.R. 127 (C.A.).

- [289] The authorities recognize an exception to this principle in those cases where the medical or surgical treatment is actionable in negligence. In those cases, *novus actus interveniens* must be pleaded and proved. Earlier in these Reasons, I dismissed the defendants' application to amend their pleadings to include a claim for *novus actus interveniens*.
- [290] It follows that whether Dr. Ozgur erred in his diagnosis and recommendation for surgery is not determinative of the issue before the Court. On the pleadings, I need not decide whether Mr. Brooks would have been better served had he been treated conservatively without resort to surgery. For purposes of the analysis of causation, the essential question that arises is whether Mr. Brooks acted reasonably in consulting Dr. Ozgur and accepting his recommendation to proceed with spinal surgery.
- [291] In order to assess the reasonableness of Mr. Brooks' actions, it is necessary to consider the circumstances in which he found himself. When Mr. Brooks met with Dr. Park on August 20, 2013, Dr. Park informed him that the MRI report indicated a fracture at C5-C6. On Dr. Park's recommendation, Mr. Brooks had further imaging done; namely, a CT scan. Mr. Brooks then met with Dr. Park on September 4, 2013, who informed him that the radiologist report regarding the CT scan suggested that it was not a fracture but a congenital abnormality. I note that, although the experts in this case reviewed the scans themselves, the radiologist report of the CT scan is not, in itself, entirely clear-cut and refers to a fracture that "could be congenital". I accept Mr. Brooks' evidence that although Dr. Park told him to resume physiotherapy treatments, Dr. Park seemed unsure of matters. This is supported by Dr. Park's clinical notes:

Congenital Abnormality?

Unlikely a FX

- [292] I also note that in Dr. Graeb's report, which was tendered by the defendants, he states that the diagnosis of cervical spondylolysis, which is generally considered to be developmental in origin, is commonly mistaken for a fracture.
- [293] Mr. Brooks persuasively explained that at the material time, he was experiencing a lot of pain and despite having undergone chiropractic and physiotherapy treatments and taken medication over several months, he found that his condition was not improving. Mr. Brooks also explained that he was confused about the conflicting imaging reports and the progression of his symptoms. He sent Dr. Chodyra a copy of the CT report and called her to discuss the matter. He accepted her recommendation that he should consult a neurosurgeon in California for a second opinion. In cross-examination, Dr. Paquette fairly acknowledged that it would be appropriate for a patient in Mr. Brooks' circumstances to seek a second opinion from a neurosurgeon. He acknowledged that many primary care physicians call his office seeking such opinions.

- [294] Insofar as the defendants contend that Mr. Brooks should have consulted Dr. Park, I am not persuaded that Mr. Brooks acted unreasonably in telephoning the family doctor with whom he had a history. He had only recently become Dr. Park's patient. In any case, his uncontroverted evidence was that because of health insurance considerations, a primary care physician, such as Dr. Park, does not generally make referrals to a particular specialist.
- [295] Mr. Brooks then proceeded to arrange for a consultation with a neurosurgeon who was "in-network" with his insurer. Mr. Brooks explained that pursuant to the terms of his health insurance, consulting an "in-network" physician would result in lower deductibles and out-of-pocket payments than consulting an "out-of-network" physician.
- [296] I accept Mr. Brooks' evidence that after conducting considerable internet research, he made an appointment to see Dr. Ozgur, who was the head neurosurgeon at a hospital in California. Dr. Ozgur is clearly a qualified neurosurgeon with operating privileges at an operating facility in California. There is no evidence to suggest that he was not qualified to perform neurosurgery or that the hospital where he performed the surgery is not an accredited hospital.
- [297] All things considered, I find that Mr. Brooks acted reasonably in consulting Dr. Ozgur and accepting his recommendation to undergo surgery. In August 2013, he had been prescribed three pain medications and was attending physiotherapy treatments for his symptoms. Plainly, Mr. Brooks would not have undergone the Neck Surgery had he not been experiencing the symptoms that I have found were caused by the First Accident and undertaken investigations in California for those symptoms. In that way, the Neck Surgery flowed from and was caused by the First Accident. Therefore, I conclude that the chain of causation is not broken and the defendants remain liable for any losses suffered. Put another way and to the same effect, there is no basis to reduce the liability of the defendants for Mr. Brooks' condition because of the Neck Surgery.

Second Accident

- [298] As I stated earlier in these Reasons, Mr. Brooks was involved in a further rear-end collision in California on December 2, 2013. There was minimal damage to his vehicle. Balancing the evidence as a whole, I find that it is more likely than not that the Second Accident aggravated his neck, upper back and shoulder girdle injuries. The probabilities of the case indicate that, in all likelihood, this exacerbation of his symptoms also adversely affected Mr. Brooks' mood and exacerbated his driving anxiety. The evidence establishes that the injuries flowing from the Second Accident merged with the residual injuries of the First Accident to create an injury that is not attributable to any one particular tortfeasor.
- [299] In short, I conclude that the injuries to Mr. Brooks' neck, upper back, and shoulder girdle flowing from the Second Accident are indivisible from the injuries caused by the First Accident and together, they constitute a single indivisible injury to Mr. Brooks.

[300] Importantly however, the Second Accident also caused an injury to Mr. Brooks' shoulder joints. This was investigated and led to operations on both shoulders. In this action, Mr. Brooks is not seeking compensation for any issues related to his shoulder joint injuries. In this way, the Second Accident caused a separate and divisible injury to Mr. Brooks.

Third Accident

[301] Mr. Brooks was involved in another rear-end on March 23, 2016. He suffered an exacerbation of his neck and upper back symptoms that lasted approximately until June 2016. Mr. Brooks is not seeking any compensation for this temporary aggravation of his injuries. In any case, to the extent the Third Accident has contributed to his neck and upper back symptoms, I find that those injuries are indivisible from the injuries he sustained in the First Accident.

Summary

[302] In summary, the evidence in this case satisfies the "but for" test. I conclude that Mr. Brooks' neck, upper back and shoulder girdle issues (shoulder blades and intrascapular region) constitute an indivisible injury occasioned by a combination of both non-tortious and tortious causes. As I stated earlier, it is not necessary for Mr. Brooks to establish that the First Accident was the sole cause of his injuries. Regardless of other contributing causes I find on a balance of probabilities that the First Accident was a contributory cause - beyond the de minimis range- of his current neck, upper back and shoulder girdle condition. The defendants are therefore liable for Mr. Brooks' neck, upper back and shoulder girdle injuries and related losses, except for his shoulder joint injuries.

DAMAGES

[303] I next address Mr. Brooks' claim for damages under the following headings:

- a. Non-pecuniary damages;
- b. Loss of future earning capacity;
- c. Loss of housekeeping capacity;
- d. Future care costs; and
- e. Special damages.

Non-pecuniary Damages

[304] The plaintiff seeks an award of non-pecuniary damages in the range of \$150,000-\$165,000.

[305] The defendants counter with the submission that if the Court accepts that Mr. Brooks was in fact injured in the First Accident, an appropriate award for non-pecuniary damages is \$5,000.

- [306] Non-pecuniary damages are intended to compensate the plaintiff for the pain, suffering and loss of enjoyment of life and of amenities experienced as a result of the defendant's negligence. The award should compensate a plaintiff for such damages suffered to the date of trial and those that the plaintiff will suffer into the future.
- [307] The award should be fair and reasonable for both parties, as those concepts are measured against the adverse impact of the particular injuries on an individual plaintiff. While fairness is assessed by reference to awards made in comparable cases, because each case is decided on its own unique facts and calls for an individualized assessment, it is neither possible nor desirable to develop a "tariff": *Lindal v. Lindal* (No. 2), [1981] 2 S.C.R. 629 at 637; *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.
- [308] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, Kirkpatrick J.A. set out a non-exhaustive list of factors to be considered in awarding damages under this head. They include: the plaintiff's age; the nature of the injury; the severity and duration of the pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism.
- [309] It is important to recognize that people have different physical and psychological susceptibility to injuries. It is the impact of the accident on the actual plaintiff that is relevant for compensatory purposes. It is a fundamental principle in assessing damages that a defendant must take the plaintiff as he is, even where, because of his unique susceptibility or vulnerability, the injury was more dramatic or unexpectedly severe than one would expect an average person to sustain. Accordingly, a defendant who injures a plaintiff with a particular susceptibility or vulnerability to injury is responsible for the consequences of the accident on that particular plaintiff: *Athey* at 473; *Erickson* at para. 250.
- [310] As I set out earlier in these Reasons, Mr. Brooks has proven entitlement to damages for his neck, upper back and shoulder girdle (not shoulder joint) injuries. He has not proven entitlement to damages for his jaw and dental complaints, psychiatric complaints or complaints relating to a right-sided C6 radiculopathy.
- [311] Mr. Brooks was 31 years old at the time of the First Accident and 37 years old at the time of trial. Over the years he has engaged extensively in treatments and therapies to alleviate his symptoms. He now has a chronic pain condition that may improve, but he is unlikely to recover fully.
- [312] Mr. Brooks must be restored to the position he would have been in absent the First Accident, and not a better position: *Athey* at para. 35. The evidence does not establish a measurable risk that, absent the First Accident, Mr. Brooks would have, in any event, become as symptomatic as he did or that his neck and upper back symptoms associated with his sedentary employment would have worsened. Accordingly, it is not appropriate to reduce his damages to reflect that possibility: *Bouchard v. Brown Bros. Motor Lease Canada*

Ltd., 2012 BCCA 331.

- [313] The totality of the evidence supports a finding that Mr. Brooks' injuries have caused him pain and suffering and adversely impacted the quality and enjoyment of his life. He has endured, and will continue to endure, the adverse impact of his injuries. Earlier in these Reasons, I set out my findings on the progression of his symptoms attributable to the First Accident and his prognosis. He has endured a serious spinal operation. He has an increased susceptibility to worsening of pain the event of a future trauma. He faces an increased risk of disc degeneration.
- [314] After taking some time off to recuperate from the Neck Surgery, Mr. Brooks continued to work. His employer has accommodated him to some extent in that he is able to work remotely some of the time. Nonetheless, I accept that as a consequence of coping with his condition, Mr. Brooks suffers in both his work life and his personal life from reduced stamina, increased fatigue, and a diminished ability to concentrate. He is burdened with anxiety regarding his future work life.
- [315] I accept that the consequences of Mr. Brooks' injuries have been distressful for him and that since the First Accident, he has suffered bouts of irritability, frustration, and increased anxiety because of his diminished self.
- [316] Prior to the First Accident, Mr. Brooks did engage in recreational activities, such as skiing and camping. His enjoyment of recreational activities of his choosing have been curtailed by his injuries. He gave an example that jumping on a trampoline caused him considerable discomfort. The enjoyment of his other leisure activities has also diminished because of his symptoms.
- [317] Mr. Brooks has been able to travel on vacation to Europe in 2016 and 2017, a fact that the defendants point out in their submissions. I accept Mr. Brooks' evidence that he travelled with diminished enjoyment because of his discomfort. I am not persuaded that the fact that he took vacations supports a finding that he is exaggerating his current symptoms.
- [318] Mr. Brooks' injuries have also impacted his family life. Although his marriage was strained before the First Accident, his limitations and episodic bouts of frustration and irritability he struggles with have increased that strain. His pattern of intimacy with his wife has been adversely affected.
- [319] Significantly, Mr. Brooks' limitations in holding and playing with his young daughter have created a genuine emotional strain on him. He also expressed regret that he would be limited in participating with her in recreational activities in the future. His distress over the adverse impact of his injuries on his role as a father was palpable in his testimony.

- [320] I find that overall, Mr. Brooks has made a genuine attempt to minimize the impact of his injuries on his lifestyle. As the Court observed in *Jones v. Arjun*, 2013 BCSC 1313 at para. 177, enduring pain, even when it is intermittent and fluctuates in intensity, casts "a negative spin on everyday living and detracts from the pleasures of life".
- [321] I have considered all the authorities cited by counsel. In light of my findings, the cases submitted by the defendants fall far short of the appropriate range of damages in this case. While the authorities defended by Mr. Brooks' counsel are instructive, I do not propose to review them in detail, as each case turns on its own unique facts. Overall, I find that the plaintiffs in those authorities suffered more severe consequences from their injuries than Mr. Brooks. Although I have concluded that the evidence does not establish a material risk that, absent the First Accident Mr. Brooks would have become as symptomatic as he did, in assessing the quantum of Mr. Brooks' damages, I must keep in mind that his pre-existing symptoms associated with his sedentary employment were part of who he was before the First Accident.
- [322] Considering the governing principles in the authorities and Mr. Brooks' particular circumstances, I conclude a fair and reasonable award for non-pecuniary damages is \$110,000.

Loss of future earning capacity

Legal Framework

- [323] An award of damages for loss of earning capacity, whether past or future, is compensation for a pecuniary loss: *Hardychuk* at para. 175. The purpose of such an award is to restore, as best as possible with a monetary award, an injured plaintiff to the position he or she would have been in had the negligence not occurred. The Court must endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career: *Pett v. Pett*, 2009 BCCA 232 at para. 19.
- [324] The plaintiff must demonstrate both an impairment to his or her earning capacity and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. If the plaintiff discharges that requirement, he or she may prove the quantification of that loss of earning capacity either on an "earnings approach" or a "capital asset" approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32 [Perren]. The earnings approach is more appropriate when the loss is more easily measurable: *Perren*. Under either approach, the plaintiff always must prove that there is a real and substantial possibility of hypothetical events leading to an income loss: *Perren*, at para. 32; *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14 [Rousta].
- [325] The Court in *Falati v. Smith*, 2010 BCSC 465 at para. 41, aff'd 2011 BCCA 45, provided an instructive distillation of the principles which inform the assessment of loss of earning:

- (i) The standard of proof is not the balance of probabilities. A plaintiff is entitled to compensation for real and substantial possibilities of loss, *Reilly v. Lynn*, 2003 BCCA 49 at para. 101. Hypothetical events are to be given weight according to their relative likelihood: *Athey* at para. 27.
- (ii) The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.) [*Milina*].
- (iii) The court must assess damages for loss of earning capacity based on the evidence, taking into account all positive and negative contingencies. The task of the court is to assess the losses, not to calculate damages with mathematical precision: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43. The overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11 [*Rosvold*].
- [326] To this list, I would add that evidence that supports a contingency must show a "realistic as opposed to a speculative possibility": *Graham v. Rourke* (1990), 75 O.R. (2d) 622 at 636 (C.A.).
- [327] In sum, the assessment of past or future loss of earning capacity requires the court to assess a pecuniary loss by weighing possibilities and probabilities of hypothetical events: *Grewal v. Naumann*, 2017 BCCA 178 at para. 49 [*Grewal*]. The test to be applied to hypothetical events, past and future, is whether there is a real and substantial possibility that the events in question would occur or would have occurred absent the defendant's negligence: *Rousta* at para. 14. In advancing a claim for the loss of income-earning capacity, whether past or future, the plaintiff must always prove a real and substantial possibility of an income loss, as opposed to a theoretical one. In other words, the award cannot be based on mere speculation: *Grewal* at para. 48; *Rousta* at para. 17. While the onus on the plaintiff is not a heavy one, it must nonetheless be met in order to justify a pecuniary award: *Kim v. Morier*, 2014 BCCA 63 at para. 7.

Discussion

- [328] The essential task of the Court is to compare the likely future of Mr. Brooks' working life if the First Accident had not happened with his likely future working life after the accident: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32 [*Gregory*]; *Rosvold* at para. 11. The Court must assess whether Mr. Brooks is entitled to any compensation because the evidence establishes a real and substantial possibility that he will suffer a future pecuniary loss.
- [329] Mr. Brooks seeks compensation for three years' salary of \$126,000 US, which totals \$378,000 US. He does not seek any compensation for loss of past earning capacity.

[330] The defendants submit that any injuries that may have been suffered in the First Accident resolved within a few weeks and accordingly there is no basis in the evidence for an award of future loss of earning capacity. In the alternative, the defence submits that even if the Court concludes that Mr. Brooks continues to suffer from the effects of the First Accident, no award is justified. The defendants' overarching submission is that the evidence does not establish that there is a real and substantial possibility of any pecuniary loss.

[331] In my assessment I have considered the following:

(i) Since the First Accident Mr. Brooks has not missed many days from work apart from an unspecified amount of days for his Neck Surgery, recuperation from the Neck Surgery and various other procedures he has undergone.

(ii) The defendants emphasize that there was no functional capacity evaluation tendered establishing that Mr. Brooks suffers from any impairment of his ability to discharge his employment duties.

Dr. Caillier notes in her report that Mr. Brooks is working full time as a senior systems application engineer in the information technology field. She states that he is capable of working in this capacity but requires an appropriate ergonomic set-up and the ability to take postural breaks during the day. She also recommends that he not work more than the 40-hour work week he currently works, as it could have a negative impact upon his mental health and sleep. Dr. Caillier acknowledged in cross-examination that she did not conduct any functional capacity testing of Mr. Brooks. However, she persuasively explained that working beyond 40 hours per week and managing chronic pain can lead to increasing difficulties and an eventual downward spiral of increasing pain symptoms.

(iii) As I mentioned earlier, Mr. Brooks' current employer has accommodated him to some extent by allowing him to remotely attend morning meetings from home and to work from home at least one day per week. They permit him the flexibility to make up the time that he takes to attend medical appointments. He is able to take regular breaks from sitting and they have improved his ergonomic set-up.

(iv) Mr. Brooks' annual performance reviews from 2013-2015 indicate that overall he has continued to meet or exceed expectations. The overall rating in his 2016 review was "needs improvement" primarily based upon some perceived shortcomings in his interpersonal skills. Mr. Brooks clearly has an excellent work ethic and strove for improvement. This is borne out by the fact that he was promoted to a supervisory position in 2017.

(v) Mr. Brooks testified there was a possibility that his current employer may merge with another company. He expressed uncertainty about his future in those circumstances. In the absence of sufficiently reliable evidence, I cannot find that there is a real and substantial possibility of an alleged merger or that Mr. Brooks is at risk of losing his current job.

(vi) On Mr. Brooks' own evidence, his perception is that, in California, there is a very high demand for and many employment opportunities for persons with his skill set.

[332] I turn to address whether there is a real and substantial possibility that, if Mr. Brooks does lose his current job, he would not be able to find employment with comparable remuneration because of his chronic pain condition. He submits that if it were to occur, he would be less marketable as an employee. That would be the case with respect to jobs requiring rigorous or significant physical requirements. However, it is not a realistic prospect that he would have pursued such a position absent his injuries. Plainly, however, Mr. Brooks has proven himself capable of continuing to work as a systems application engineer after the First Accident. There is an insufficient evidentiary basis upon which to infer that Mr. Brooks could not find employment elsewhere with comparable remuneration where the hours and expectations would align with his capacity.

[333] Weighing the evidence as a whole I cannot conclude that that any functional limitations caused by Mr. Brooks' injuries have reduced his realistic career options or otherwise negatively affected his competitive employability. In all the circumstances, I cannot find that there is a real and substantial possibility that he will suffer a future loss of income because of an inability to pursue employment that would require a physical capacity beyond that which his present job requires or that other opportunities that were otherwise realistic options for him will be foreclosed to him.

[334] All things considered, I cannot conclude that there is a real and substantial possibility that Mr. Brooks will suffer a future pecuniary loss because of any diminished earning capacity.

[335] However, as I indicated earlier, I accept that Mr. Brooks suffers from diminished levels of stamina and a diminished ability to concentrate and that he is burdened with anxiety about his future work life. I have considered that as a factor in my assessment of non-pecuniary damages.

Loss of housekeeping capacity

[336] I turn next to address whether Mr. Brooks is entitled to compensation for the impairment of his housekeeping capacity.

Legal Framework

[337] In *Dykeman v. Porohowski*, 2010 BCCA 36 at para. 28 [Dykeman], Newbury J.A. summarized the governing principles with respect to awarding damages for the loss or impairment of housekeeping capacity. She affirmed that where housekeeping services were gratuitously replaced by a family member, damages for the loss of housekeeping capacity may be awarded even though the plaintiff has not incurred any expense. Recovery may be allowed for both the future loss of the ability to perform household tasks as well as for the loss of such abilities prior to trial. The amount of compensation awarded must be commensurate with the plaintiff's loss: *Dykeman* at para. 29; *X. v. Y.*, 2011 BCSC 944 at para. 246.

[338] In *O'Connell v. Yung*, 2012 BCCA 57 at para. 67 [O'Connell], the Court clarified that an award for loss of housekeeping capacity is intended to compensate the plaintiff for the loss of an asset: the ability to perform household tasks. Accordingly, whether replacement costs for housekeeping were actually incurred or whether a plaintiff is likely to hire such assistance in the future does not inform the analysis. Loss of capacity claims are doctrinally distinct from future costs of care claims. Damages for cost of future care serve a different purpose and are directly related to expenses that may reasonably be expected to be required to be rendered to the plaintiff.

[339] The cost of replacement services may inform the assessment of the appropriate quantum of an award for loss of capacity. However, the appellate authorities endorse a cautious and restrained approach to awards for loss of housekeeping capacity. The ultimate reasonableness of the award is the overarching consideration: *Westbroek v. Brizuela*, 2014 BCCA 48; *Chappell* at paras. 254-262; *Liu v. Bains*, 2016 BCCA 374 at paras. 28-29.

Discussion

[340] Given his limitations, Dr. Caillier recommended that Mr. Brooks have assistance with home maintenance activities and heavier seasonal cleaning inside and outside the home. In quantifying his claim, Mr. Brooks relied on a summary of costs in U.S. dollars prepared by Jennifer Lane, an occupational therapist. Robert Carson, an economist, provided the multipliers for calculating the net present value of the future annual costs of the items sought in his expert report.

[341] Mr. Brooks seeks an award of \$155,581 US calculated as follows:

Annual

Present Value of Future Cost

a. Housekeeping Services

\$570.25

\$16,149.48

b. Seasonal Cleaning

\$364.96

\$9,981.66

c. Home Maintenance

\$1,596.00

\$45,198.72

d. Lawn and Garden Care

\$2,975.00

\$84,252.00

Total

\$5,506.21 US

\$155,581.86 US

[342] The defendants submit that the claim for the loss of housekeeping capacity, both past and future, must fail for the lack of a sufficient evidentiary foundation.

[343] Although performing many tasks cause him considerable discomfort, the evidence shows that Mr. Brooks is able to perform regular and seasonal indoor housekeeping tasks. Mr. Brooks has resumed most of his indoor housekeeping responsibilities, such as laundry, sweeping and vacuuming, in large part, because his wife is unable to perform them. Mr. Brooks moved into his home with a yard in 2014. He mows the grass with a self-propelled mower and performs some light weeding.

[344] I accept that Mr. Brooks is unable to do heavier indoor maintenance work and heavier outdoor maintenance and yard work because of his limitations with his neck, upper back and shoulder girdle. While I recognize that Dr. Caillier assessed Mr. Brooks in late 2015, the totality of the evidence supports a finding that Mr. Brooks has lost much of his capacity to perform heavier indoor and outdoor maintenance and yard work because of the injuries he sustained in the First Accident. The evidence does not establish that he had any such limitations prior to the First Accident. I accept that he was able to perform substantial yard work at his parents' home prior to the First Accident.

[345] The evidence shows that in 2015, Mr. Brooks incurred costs of \$400 US for home maintenance and in 2016 Mr. Brooks hired outside service providers for tree care, planter work, seasonal outdoor clean-up and sprinkler work. He incurred costs of \$160 US in 2016 and a total of \$2,630 US in 2017.

[346] In this case, I consider it appropriate to compensate Mr. Brooks for the pre-trial costs he has incurred for indoor and outdoor home maintenance through the award of special damages. Accordingly, I will address that aspect of his claim later in these Reasons. To also compensate him for the pre-trial loss of capacity would result in an overlapping recovery.

[347] I turn to consider his future housekeeping loss.

[348] Balancing the evidence as a whole, including the medical evidence, I find there is a real and substantial possibility that Mr. Brooks will continue to be unable to perform the more strenuous or heavier indoor and outdoor maintenance and yard work into the future, including when he experiences episodic aggravations of his symptoms. The evidence on precisely which indoor and outdoor maintenance and yard work Mr. Brooks would have performed, but for his injuries, was thin.

- [349] Ms. Lane estimates lawn and garden care at \$87.50 US per hour for 34 hours per year and home maintenance at \$76 US per hour at 21 hours per year. Her calculations are based on home maintenance and lawn and garden care being required to age 85.
- [350] My view is that these estimates are high, both in terms of market costs for services and hours estimated. Further, they do not take into account the realistic possibility that Mr. Brooks would have moved from his home or would have required assistance with these items well before age 85, even if he had not been injured in the First Accident.
- [351] All things considered, and keeping in mind that an award for future loss of housekeeping capacity is intended to compensate Mr. Brooks for his diminished loss of capacity and is not a precise mathematical calculation, a fair award is \$20,000.

Costs of future care

Legal Framework

- [352] The approach to be taken in assessing future care costs is well-established.
- [353] When full restoration to the plaintiff's pre-accident condition cannot be achieved, the court should strive to provide the compensation necessary to achieve the provision of adequate future care: Milina at para. 172. The purpose of an award for future care is to compensate a plaintiff for costs which reasonably may be expected to be incurred to preserve and promote the plaintiff's mental and physical health: Milina at para. 78; Gigmac v. Insurance Corporation of British Columbia, 2012 BCCA 351 at para. 30.
- [354] The test for determining the appropriate award is objective and must be based on the medical evidence. The items or services claimed must be medically justified and the claim must be reasonable: Milina at para. 184. The Court of Appeal clarified, in Gregory, that determining whether an item or service is medically justified is not limited to what medical doctors recommend, rather it can include recommendations from a variety of healthcare professionals, such as a rehabilitation expert. The Court of Appeal in Penner v. Insurance Corporation of British Columbia, 2011 BCCA 135 [Penner], also observed that a "little common sense should inform claims under this head, however much they may be recommended by experts in the field": at para. 13.
- [355] In assessing what is reasonably necessary to promote the plaintiff's health, the court should also consider whether the plaintiff would likely avail his or herself of the items or services in the future: Penner at paras. 12-14. While a plaintiff must always establish the necessity and utility of a future care item sought, "there is no hard and fast rule" that requires a plaintiff to testify that he or she intends to use the item in order to justify an award: Lo v. Matsumoto, 2015 BCCA 84 at paras. 20-21. The Court should be cautious about reducing or eliminating the cost for an item of future care simply on the basis that the plaintiff has not confirmed a willingness to participate in the course of care. The Court must be mindful that a plaintiff may not have had the means or ability to follow certain

courses of treatment in the past *Suthakar v. Humble*, 2016 BCSC 155 at para. 129.

[356] The courts have long recognized that an assessment for future care costs is not a precise accounting exercise. Adjustments may be made for "the contingency that the future may differ from what the evidence at trial indicates": *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the consideration of the specific care needs of the plaintiff. The assessment of the expenditures that reasonably may be required must take into account the prospect of any improvement in the plaintiff's condition, or conversely, the prospect that additional care will be required: *O'Connell* at paras. 67-68; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

Discussion

[357] Jennifer Lane, an occupational therapist, prepared a summary of costs in U.S. dollars of the care items sought by Mr. Brooks. The summary is based on the recommendations made by Dr. Caillier and Dr. Rickards. As I stated earlier, Robert Carson, an economist, in his expert report, provided the multipliers calculating the net present value of the future annual costs of care for the items sought.

[358] Mr. Brooks seeks the following future care costs:

Annual

Present Value of Future Cost

a. Botox

\$707.00

\$707.00

b. Massage / Physio

\$276 - \$600

\$12,756.75

c. Medications / Vitamins

\$1,509.11

\$43,952.83

d. Ergonomic

\$270.00

\$6,124.72

e. Psychological Counselling

\$3,120.00

\$3,120.00

f. Kinesiology (yr 1)

\$1,632 - \$1,765

\$1,683.00

g. Kinesiology (yr 2-3)

\$1,088 - \$1,632

\$3,884.16

h. Gym Membership

\$361.25

\$10,521.41

Total

\$8,963.36 - \$9,964.36 US

\$82,749.87 US

[359] The defendants' submission is anchored in their overarching position in this litigation that any injuries Mr. Brooks may have sustained in the First Accident resolved long ago. Therefore, they submit that his claim for future care costs should be dismissed in its entirety. They submit in the alternative that, should any care items be required in the future, those costs will be covered by Mr. Brooks' health insurance.

[360] Before turning to the analysis of the individual future care items, I will address the defendants' submission that any claim for the cost of future care should be reduced to account for the existence of Mr. Brooks' health insurance that is available to him through his employment.

[361] Mr. Brooks submits that no reduction, or in the alternative, only a minimal reduction is warranted because of the "private insurance exception". He points out the uncertainty associated with whether he will continue to be employed by the same employer with the same health insurance into the future.

[362] Any potential reduction in an award for future care cost is rooted in the fundamental principle for compensation in tort law that a plaintiff is only entitled to be placed in the position they would have been in absent the defendant's negligence. The application of the private insurance exception operates as an exception to the strict application of the compensation principle.

[363] The private insurance exception was expounded upon by Justice Cory, for the majority, in *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359 at 401 [Cunningham]:

Recovery in tort is dependent on the plaintiff establishing injury and loss resulting from an act of misfeasance or nonfeasance on the part of the defendant, the tortfeasor. I can see no reason why a tortfeasor should benefit from the sacrifices made by a plaintiff in obtaining an insurance policy to provide for lost wages. Tort recovery is based on some wrongdoing. It makes little sense for a wrongdoer to benefit from the private act of forethought and sacrifice of the plaintiff.

[364] More recently, Mr. Justice Cromwell in *IBM Canada Limited v. Waterman*, 2013 SCC 70 [Waterman] clarified that the private insurance exception applies not only to insurance benefits in the strict sense but to other benefits to which an employee has contributed. He affirmed the core principle that benefits received by a plaintiff through private insurance are not deductible from damage awards (at para. 41).

[365] I also observe that if health care costs may be paid by a third party in the future and that party has a right of subrogation or could require repayment, no issue of double recovery arises and therefore there is no sound basis for reducing an award: *Kanters v. Galasinao*, 2015 BCSC 1532 [Kanters].

[366] There is a dearth of appellate consideration in B.C. of the impact of benefits payable pursuant to a health insurance plan upon an award for the cost of future care. The jurisprudence in this Court on the point is unsettled.

[367] In determining a reasonable award for future care costs, some courts have applied a deduction if a plaintiff had health benefits plan or health insurance through their employment: *Chappell* at para. 276; *Clayton v. Barefoot*, 2018 BCSC 239 at paras. 232-233; *Harvey v. Yanko*, 2007 BCSC 216 at para. 92. In *Chappell*, I note that the private insurance exception does not appear to have been raised by the parties in the context of the future care costs claim.

[368] In *McCartney v. McArthur*, 2014 BCSC 2164, the Court refused to make an award for future care costs because the plaintiff was entitled to benefits under an extended health care benefits plan.

[369] In *Tabet v. Hatzis*, 2013 BCSC 1167, Madam Justice Dickson (when she was a member of this Court) held that future health care benefits "should not be deducted from the cost of future care award based on the principles enunciated in *Cunningham*". Other cases in which the court has rejected the applicability of any deduction in the future care cost award on account of the plaintiff's health care insurance include *Bains v. Prasad*, 2005 BCSC 1694; *McLeod v. Goodman*, 2014 BCSC 839; *Dhanji v. Holland*, 2015 BCSC 1351; and *Provost v. Bolton*, 2018 BCSC 1090.

[370] In *Kanters*, Mr. Justice Blok instructively observed:

[321] First, extended health coverage was a benefit associated with Ms. Kanter's employment. Collateral benefits are not deducted from an award where an employee has paid or contributed to the cost of coverage. As noted in Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Scarborough: Carswell, 1996) at p. 608: "It will now be very rare for a court to hold that benefits in the nature of insurance were not in some way contributed to by an employee". The defendant did not refer to or lead evidence suggesting otherwise. Second, a sample claim form in evidence at trial requires the employee to disclose whether the claim results from a motor vehicle accident, and if so, it requires that the claim be first submitted to the automobile insurer. This suggests the insurer would subrogate or require repayment in some fashion. Third, there is a right of subrogation at common law and so the absence of an express subrogation provision in the plan may not be determinative of the issue

[Emphasis added.]

[371] In my view, the weight of the authorities supports the proposition that future benefits from a health insurance plan for which a plaintiff has paid or contributed through his or her employment are collateral benefits that fall directly within the private insurance exception and are not properly deducted from the cost of a future care award.

[372] In this case, the evidence establishes that Mr. Brooks pays for his health insurance and that he pays the premiums and applicable deductibles. The fact that he has health insurance does not, in itself, disentitle him to an award for future care costs.

[373] I turn to consider whether Mr. Brooks is otherwise entitled to any award for future care costs. I will address each item in turn.

Botox Treatment

[374] Dr. Caillier states in her report that Mr. Brooks "may benefit from a trial of Botox to the neck region" to treat his muscle spasms. Dr. Caillier agreed on cross-examination that Botox injections into the neck area can have the adverse consequence of weakening the neck muscles.

[375] Balancing the evidence as a whole, I cannot conclude that Botox treatment for Mr. Brooks' neck is reasonably necessary to promote his health, as the term "reasonably necessary" is understood within the authorities.

[376] Furthermore, the evidence does not establish that Mr. Brooks has sought out any Botox treatment for his neck since Dr. Caillier made her recommendations or that he is likely to pursue such a treatment.

[377] In all the circumstances, I am not persuaded that an award for this item is justified.

Medications and Vitamins

- [378] In her report, Dr. Caillier has recommended that Mr. Brooks try various medications and vitamins for his cervicogenic headaches, including Nortriptyline, Effexor, Topamax, magnesium citrate at 200mg per day, riboflavin 400mg per day, co-enzyme Q10, and butterbur. Based on Ms. Lane's cost estimates of a yearly cost of \$1,509.11(based upon one dose per day for each item) and applying Mr. Carson's multiplier, Mr. Brooks seeks \$43,952.83 US.
- [379] Weighing the evidence as a whole, I am not persuaded that these medications and vitamins are reasonably necessary to promote Mr. Brooks' health, within the meaning of the authorities. Moreover, one dose per day of each of the items over Mr. Brooks' lifetime is not reasonable. Furthermore, there was no evidence as to whether Mr. Brooks has tried any of these medications recommended by Dr. Caillier or whether it is likely that he would try any of the medications or vitamins in the future. As I stated earlier, the evidence on Mr. Brooks' current medication regime was sparse.
- [380] All things considered, I cannot conclude that an award for this item is warranted.

Psychological Counselling

- [381] Dr. Goldstein recommended that Mr. Brooks have additional psychological treatments every two weeks for the next year. Given my conclusions regarding her report, I cannot accord her recommendations much weight.
- [382] In November 2015, Dr. Caillier recommended that Mr. Brooks be assessed by a psychologist for pain management strategies and to assist with his mood. Since her report was issued, Mr. Brooks has attended many sessions with a psychologist. The evidence shows Mr. Brooks attended 18 sessions of counselling with Dr. Aberra from December 2013 until November 2014, and at least 38 sessions with Dr. Darrington from January 2015 until February 20, 2017. In the summer of 2016, Dr. Darrington's clinical notes describe Mr. Brooks' driving anxiety as mild "when cars stop suddenly".
- [383] In the absence of a sufficiently reliable assessment and recommendation from an expert health care professional, I am not persuaded that further psychological interventions to treat the symptoms attributable to the defendants' negligence is warranted.

Kinesiology and Gym Membership

- [384] Dr. Rickards and Dr. Caillier both recommended that Mr. Brooks participate in an active rehabilitation program with a kinesiologist and have ongoing access to a gym in order to improve his physical conditioning and to improve the strength of his neck, upper back and shoulder areas. Given that his pain or discomfort is expected to persist indefinitely, both Dr. Rickards and Dr. Caillier emphasized that a regular exercise program is necessary to preserve Mr. Brooks' health.

- [385] Mr. Brooks regularly attended supervised exercise sessions from September 2014 through to September 2016, at a rehabilitation facility in California.
- [386] In my view, a further three sessions per year for the next three years with a kinesiologist are reasonably necessary to promote Mr. Brooks' health and to ensure that he maintains his physical conditioning. Based on his commitment to attending the rehabilitation centre, I am satisfied that Mr. Brooks would likely avail himself of these kinesiology sessions in the future. Ms. Lane has costed these sessions to be \$68. I therefore award \$600 US (rounded down from \$612) for this item.
- [387] It can reasonably be inferred that Mr. Brooks likely would pursue an independent exercise program if he was awarded a gym membership. He confirmed that he does not have access to a gym through his employment.
- [388] Ms. Lane has costed the annual fee for a gym membership at \$361.25 per year. Mr. Brooks seeks \$10,521.41. This amount includes an allowance for a gym membership for the rest of his life, which I find unrealistic.
- [389] Taking into account the relevant contingencies, I assess \$5,000 US for a gym membership.

Physiotherapy and Massage

- [390] Both Dr. Caillier and Dr. Rickards recommended massage therapy or physiotherapy treatment for Mr. Brooks' symptoms on an "as needed" basis.
- [391] Mr. Brooks has engaged extensively in various therapies, seeking relief from his symptoms. The physiotherapy treatments have given him some measure of relief. In my view, it is reasonable and justifiable that some allowance be made for future treatments as part of his overall future pain management strategy to help him settle his episodic aggravations of his symptoms.
- [392] In short, I accept that some treatments are reasonably necessary because of Mr. Brooks' injuries, which are expected to cause him pain or discomfort indefinitely. It can reasonably be inferred on the evidence that Mr. Brooks would access these treatments from time-to-time, on an "as needed" basis.
- [393] I also accept that, because of Mr. Brooks' pre-existing back and neck symptoms associated with his sedentary employment, some expenses may have been incurred absent the First Accident.
- [394] Ms. Lane has calculated the cost of physiotherapy treatments as ranging from \$69 to \$100 per session. Mr. Brooks typically paid \$87 US for a single physiotherapy session in California. Mr. Brooks seeks four to six sessions per year for his lifetime at what he estimates to be a cost of \$12,756.75 US. In my view, the amount sought is excessive.

[395] Taking into account the contingencies, and in particular the negative contingency that Mr. Brooks may have incurred some of these costs absent the First Accident, in my view, a fair and reasonable award for future treatments is \$7,000 US.

Ergonomic Equipment

[396] Dr. Caillier has also recommended that Mr. Brooks' workstations at his home and workplace be fitted with ergonomic equipment to "ensure that there not undue stress placed upon the musculature of the neck, upper back, and shoulder girdle regions one involved in sustained posturing". Ms. Lane estimates \$2800 as the cost for purchasing two workstations. With replacements every 10 years, until age 65, Ms. Lane estimates the cost for optimizing Mr. Brooks' workstations to be \$280 US per year. After applying Mr. Carson's multipliers, this totals \$6,124.72 US.

[397] Weighing the evidence and particularly considering Mr. Brooks' testimony that his employer had an ergonomic assessment done and, at his request, recently bought him a new chair, I cannot conclude that Mr. Brooks likely would incur any expenses for ergonomic equipment at his workplace.

[398] In my view, the purchase of an ergonomic chair and other items to support his function and comfort at home is a justified expense. It can reasonably be inferred that with the elimination of any financial impediment, Mr. Brooks would utilize this item. There should be some allowance for replacements.

[399] I allow \$2,000 US for this item.

[400] Keeping in mind that the assessment of future costs is not a precise accounting exercise, I assess a total award for the cost of future care in the amount of \$14,600 US.

Special Damages

[401] Mr. Brooks seeks special damages in the amount of \$1,580.50 CA and \$210,149.95 US, calculated as follows:

Canadian

Mr. Brooks' personally incurred expenses:

\$1,078.61

Pacific Blue Cross claim:

\$501.89

Total

\$1,580.50 CA

American

Mr. Brooks' personally incurred expenses:

\$17,476.33

Aetna claim:

\$167,469.54

Additional premiums paid:

\$25,203.88

Total

\$210,149.75 US

[402] Pursuant to the agreed statement of facts, the parties agreed that:

- (i) Mr. Brooks' health care expenses incurred in the U.S. are mostly covered by his health insurance plan connected to his employment. The insurance company is Aetna.
- (ii) Mr. Brooks pays insurance premiums by way of deductions from his pay.
- (iii) Aetna, or its assigns, negotiates and pays the health care providers for the health care expenses. The Rawlings Company LLC ("Rawlings") is administering the reimbursement claim.
- (iv) The plaintiff or his health care providers submitted \$532,694.21 US in health care costs to his health insurance plan from August 20, 2013 up to May 7, 2018. Aetna, Rawlings or their assigns have negotiated those costs and paid the providers a total of \$192,278.00 US.
- (v) Rawlings has a reimbursement claim against Mr. Brooks for health care expenses that he incurred as a result of the First Accident and the Second Accident.

[403] Mr. Brooks' claim is a combination of expenses he spent personally and the amounts he alleges his Canadian and U.S. insurers are entitled to be paid back. He also seeks the additional premiums he says he paid in order to have a superior benefits program.

[404] The defendants' overarching submission is that there should be no award for special damages. However, they concede that they are liable for the amounts paid by Mr. Brooks' insurers to the extent these expenses were incurred as a result of the First Accident.

[405] It is well-established that an injured person is entitled to recover the reasonable out-of-pocket expenses they incurred as a result of an accident. This is grounded in the fundamental compensatory principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *Milina* at para. 78; *X. v. Y.* at para. 281. It follows that a plaintiff is not entitled to be put in a better position than that he or she would have been in, absent the defendants' negligence. Accordingly, if a plaintiff would have incurred the expense even without the accident related injuries, the expense cannot be recovered: *Perry v. Vargas*, 2012 BCSC 1925 at para. 159.

[406] The parties' submissions on special damages were not well-developed.

Canadian Expenses

[407] I allow \$453.49 (\$450 for physiotherapy treatments and \$3.49 for prescription medication) for expenses Mr. Brooks incurred personally. The initial physiotherapy treatments are not properly recoverable as Mr. Brooks initially did not seek treatment for his accident-related injuries. Mr. Brooks' claim for mileage and three acupuncture treatments are not proven. On the evidence, I am unable to determine the symptoms for which Mr. Brooks sought the acupuncture treatments.

[408] After deducting the cost of the initial physiotherapy treatment, I allow \$251.89 for the Pacific Blue Cross claim.

[409] In sum, I allow \$705.38 CA for the Canadian special expenses.

U.S. Expenses

[410] In addition to the health care costs paid by his health insurance plan, Mr. Brooks asserts that he has incurred various out of pocket expenses from August 2013 onwards, as follows:

Imaging Rad Alliance Inc.

\$524.59

Imaging Siminmed

\$154.20

Imaging Claremont

\$144.59

Injection - Caringi

\$145.00

Pain Medicine Services

\$363.01

Casa Colina (physiotherapy)

\$3,420.00

*Optimum Medical (jaw)

\$559.85

Chaparral Med Group

\$12.78

*Dr. Darrington

\$1,093.80

Mid Valley Surgery

\$182.40

*D. Tabata (jaw)

\$415.00

Physio - Core Performance

\$448.38

Prescriptions

\$688.76

Misc. Supplies

\$160.38

Housekeeping

\$400.00

Yard Work

\$2,790.00

*Parking

\$25.00

*Mileage

\$2,120.80

TOTAL

\$13,648.54 US

[411] Given my findings, the expenses for treatment of Mr. Brooks' bruxism and jaw-related complaints in the amount of \$974.85 (\$559.85 and \$415) are not properly recoverable.

[412] On the evidence, Mr. Brooks has not proven \$11.00 of parking charges (\$14.00 are proven) and \$2,120.80 in mileage expenses.

[413] With respect to expenses for Dr. Darrington of \$1,093.80, I find the majority of those expenses relate to Mr. Brooks' marital and family issues and would have been incurred absent the defendants' negligence. Balancing the evidence as a whole, I find that some of Dr. Darrington sessions related to treatment of Mr. Brooks' driving anxiety symptoms and

increased distress and anxiety caused by his accident-related injuries. Doing my best with the imperfect evidence, I allow \$398.14 (approximately 30% of the charges) as properly recoverable.

[414] I find the balance of the expenses claimed to be reasonable and properly recoverable expenses.

[415] In sum, I award \$9,846.23 US for expenses Mr. Brooks incurred personally.

The Rawlings reimbursement claim

[416] I next turn to the Rawlings reimbursement claim.

[417] The statements of the payments (88 pages) made by Rawlings from August 2013 until March 2018 were produced at trial (the "Rawlings Pay-Out Statements"). In his testimony, Mr. Brooks explained that he had indicated on the print-outs which of the treatments related to the injuries he sustained in the First Accident, Second Accident (shoulder joint issues) and Third Accident, respectively. He also indicated which treatments he asserts relate to the indivisible injuries he sustained in the First and Second Accidents. The amounts he seeks are calculated as follows:

First Accident:

\$145,188.11

First and Second Accidents:

\$22,281.43

\$167,469.54

[418] Mr. Brooks is not seeking reimbursement for the treatments relating to the Third Accident (\$1,779.40) or for any treatments relating to the injury to his shoulder joints that he says he sustained in the Second Accident (\$23,029.06).

[419] I have reviewed the Rawlings Pay-Out Statements. Given my findings on causation in this action, Mr. Brooks is not entitled to recover any costs relating to the treatment of his jaw complaints or his radiculopathy symptoms. Therefore, as best as I was able, I calculated the amount of the payments that related to Mr. Brooks' jaw complaints (\$4,934) and radiculopathy-related treatments (\$3,996.72). I have also considered that, absent his accident-related injuries, Mr. Brooks likely would have sought some treatment for his pre-existing symptoms associated with his sedentary employment. I have deducted \$2,175 US, assuming 25 sessions over the material time and applying Ms. Lane's cost estimate of \$87 US per physical therapy session.

[420] Finally, in the absence of sufficiently reliable medical evidence on the point, I do not accept the defendant's assertion that there should be a deduction in the amount recoverable because the amount of treatment undertaken by Mr. Brooks was "excessive to a marked degree". This assertion is overtaken by the reality of Mr. Brooks' circumstances.

[421] In sum, I find \$156,363.82 is recoverable, calculated as follows:

\$167,469.54

-

Total Sought

-

\$4,934.00

-

Jaw Related

-

\$3,996.72

-

Radiculopathy Related

-

\$2,175.00

-

Treatments that would have been incurred in any event

\$156,363.82

Additional Premiums

[422] I turn to consider Mr. Brooks' claim for \$25,203.88 US for the additional premiums he says he paid on account of the First Accident.

[423] When Mr. Brooks moved to California, he enrolled in the more expensive health insurance plan made available to him through his new employment. He says he did so in order to ensure that all of his and his wife's medical expenses would be covered. From 2013 to 2017, he paid \$91.53 US biweekly more in contributions than he would have on the other plan offered. From 2017 to 2018, when his daughter was added to his insurance plan, Mr. Brooks paid \$118 US more biweekly.

[424] On balancing the evidence as a whole, and in particular considering his wife's significant medical challenges and his pre-existing symptoms, I conclude that it is more likely than not that Mr. Brooks would have selected the more expensive plan when he went to work in the USA whether or not he had been injured in the First Accident. In my view, the \$25,203.88 for additional premiums is not properly recoverable in this action.

[425] In sum, I allow \$166,210.05 US (\$9,846.23 US + \$156,363.82 US) for Mr. Brooks' U.S. special expenses.

FOREIGN MONEY CLAIMS ACT

[426] The Foreign Money Claims Act, R.S.B.C. 1996, c. 155, provides for damages to be made payable in the amount of Canadian currency that is necessary to purchase the equivalent amount of another currency, if that is necessary to provide full compensation. The Act states:

1. (1) If, before making an order for the payment of money arising out of a claim or loss, the court considers that the person in whose favour the order will be made will be most truly and exactly compensated if all or part of the money payable under the order is measured in a currency other than the currency of Canada, the court must order that the money payable under the order will be that amount of Canadian currency that is necessary to purchase the equivalent amount of the other currency at a chartered bank located in British Columbia at the close of business on the conversion date.
- (2) The conversion date is the last day, before the day on which a payment under the order is made by the judgment debtor to the judgment creditor, that the bank referred to in subsection (1) quotes a Canadian dollar equivalent to the other currency.

[427] In this case Mr. Brooks resides in California. His expenses are in United States dollars. Therefore, the damages I have awarded for cost of future care and special damages (but not for loss of housekeeping capacity) are stated in US dollars. The amount payable under the order will be the amount of Canadian currency that is necessary to purchase the equivalent amounts, pursuant to the Foreign Money Claims Act: *Bonham v. Weir*, 2009 BCSC 1080 at para.48.

CONCLUSION

[428] Mr. Brooks' damages are assessed as follows:

Non-pecuniary Damages:

\$110,000 CA

Loss of Housekeeping Capacity

\$20,000 CA

Costs of Future Care:

\$14,600 US

Special Damages (Canada):

\$705.38 CA

Special Damages (USA):

\$166,210.05 US

[429] As I found the injuries Mr. Brooks sustained to his neck, upper back and shoulder girdle (not shoulder joints) to be indivisible, I have assessed damages globally.

COSTS

[430] Mr. Brooks is entitled to his costs at Scale B unless there are pertinent circumstances that should be brought to the Court's attention.

[431] Because I am now retired as a judge of this Court, if the parties wish to make submissions concerning costs, they should contact Supreme Court Scheduling to arrange a hearing date before another judge of this Court.

"Dardi J."

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