

CANADA / JUDGMENT

Cook v. Kang

2020 BCSC 526

COURT

Supreme Court of British Columbia

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2020 BCSC 526 Cook v. Kang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cook v. Kang,

2020 BCSC 526

Date: 20200403

Docket: M084033

Registry: Vancouver

Between:

Daryl Edward Cook

Plaintiff

And

Yung Sun Kang and

Kim Young Hee

Defendants

- and -

Docket: M113954

Registry: Vancouver

Between:

Daryl Edward Cook

Plaintiff

And

John Doe and/or Jane Doe and

The Insurance Corporation of British Columbia

Defendants

- and -

Docket: M185826

Registry: New Westminster

Between:

Daryl Edward Cook

Plaintiff

And

Thi Truc Le and

Anh Tuan Huynh

Defendants

- and -

Docket: M188858

Registry: New Westminster

Between:

Daryl Edward Cook

Plaintiff

And

Bailey Dempster

Defendant

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

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Naznin Arum

Place and Dates of Trial:

New Westminster, B.C.

September 9-12; 16-20, 2019

September 23-27; 30, 2019

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Place and Date of Judgment:

Vancouver, B.C.

April 3, 2020

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(1) Introduction

[1] The plaintiff Daryl Edward Cook seeks damages arising from four separate motor vehicle collisions between 2006 and 2016. The defendants have admitted liability in respect of Collision #1, #3 and #4. With respect to Collision #2, the defendant Insurance Corporation of British Columbia ("ICBC") argues that Mr. Cook is not entitled to judgment in his favour because he failed to take all reasonable steps to identify the driver of the other vehicle involved. These reasons for judgment deal with that issue, as well as the nature, extent, and duration of injuries suffered by Mr. Cook, and the quantum of his damages.

(2) Facts

(2.1) Mr. Cook's Background

[2] Mr. Cook was born in 1968 and grew up in Burnaby, British Columbia. He is the oldest of three siblings. He excelled at sports throughout his school years. He also had a paper route and worked at part time and summer jobs during high school. He obtained his diploma from Burnaby North high school.

[3] A friend aptly described Mr. Cook in his younger years as a great all around athlete. Mr. Cook played a variety of sports including soccer, rugby, lacrosse, and golf. He was particularly good at soccer and lacrosse. In his trial testimony, he presented a number of soccer and lacrosse trophies and awards from his pre-teen years. Mr. Cook continued to play lacrosse competitively at the intermediate and junior levels. When he got into the senior

ranks at age 19, he played in a Junior B lacrosse league. He was drafted by a Junior A team, but at that point "chose to do other things" with his life. It appears that Mr. Cook stopped playing competitive lacrosse at the age of 22 or 23.

- [4] After high school, Mr. Cook had jobs in customer service, and as a floor installer, a cable installer, a bouncer and bartender, and a garbage man. In 1989, while working as a customer service representative for a company called Grip Clinch Fasteners, Mr. Cook received an injury affecting his right ulnar nerve. He made a Workers Compensation Board ("WCB") claim in connection with this injury. He later received an injury affecting his left ulnar nerve. Over the next several years, Mr. Cook has had multiple surgeries to treat his ulnar nerve conditions. His WCB claim was contentious, and he spent over a decade pursuing it. Mr. Cook's dispute with WCB did not conclude until the dismissal of his final appeal in 2003.
- [5] Some time in the early 2000s, Mr. Cook started his own business, carried on through a closely-held company called Edward's International Services Inc. There were two completely separate facets to the business. One branch of the business involved personal security and body guard services. The other branch involved the sale of promotional items, including but not limited to t-shirts imprinted with luxury car brand names such as Bentley, Jaguar, and Porsche.
- [6] In about 2006, Mr. Cook began to focus his efforts on a residential real estate development project. He purchased a lot on Gore Avenue in Vancouver, subdivided it, oversaw the construction of three single family homes, and eventually sold all three of them for a profit. This venture had just gotten underway when Mr. Cook was involved the first of the four collisions dealt with in the present court action.
- [7] Meanwhile, in terms of his personal life, Mr. Cook started a relationship with Nicole Behrenz in 1995. They began living together in 1997 and from that point forward it appears that they had somewhat of an on-again, off-again relationship. They have one child together, Wyatt, who was born at the end of 2009 and is now 10 years old. As a young child, Wyatt had medical challenges that required him to spend a fair amount of time at children's hospital. Mr. Cook and Ms. Behrenz separated in June of 2017 and have not reconciled since. Mr. Cook continues to be actively involved in parenting Wyatt.
- [8] Mr. Cook had a number of medical and health concerns that preceded the four collisions in issue in this case. As noted, Mr. Cook had a series of injuries to the ulnar nerves in both arms. Between October 1994 and July 1993, Mr. Cook had a total of four ulnar nerve surgeries. Mr. Cook was also involved in two prior motor vehicle collisions, in 1994 and 2003. He did not report any notable physical injuries in connection with the 1994 collision. In the 2003 collision, Mr. Cook suffered injuries leading to pain in his neck, right shoulder, and right knee. The relationship between these symptoms and the injuries Mr. Cook suffered in the four collisions which are the subject of the present action is discussed below.

(2.2) Collision #1 [Cook v. Kang and Hee]

- [9] Collision #1 took place on 24 September 2006, on King George Boulevard in Surrey. Mr. Cook was driving his Dodge 3500 pickup truck with his brother in the passenger seat. Mr. Cook's truck was rear-ended by a Toyota Sienna minivan driven by the defendant Yung Sun Kang and owned by Mr. Kang and his wife, the second defendant Kim Young Hee. In his trial testimony, Mr. Cook did not give detailed evidence about the collision or how it happened. This is not particularly surprising considering that he was rear-ended.
- [10] Mr. Kang, whose testimony I accept as credible and reliable, gave evidence that he was travelling northbound on King George Boulevard, with a line of cars ahead of him slowing for a red light. Mr. Kang frankly admitted he was not paying due attention to the road, because the vehicles ahead of him were going slowly and he was perusing a shopping list. He did not realize how close he was to the vehicle in front of him, Mr. Cook's truck, and ran into it. Mr. Kang testified that his van was moving slowly, perhaps walking speed, due to the traffic. The front bumper of Mr. Kang's van ran into the trailer hitch on Mr. Cook's pickup truck. This was the only point of contact between the two vehicles.
- [11] Mr. Kang was at the collision scene for perhaps five to ten minutes. He spoke briefly with Mr. Cook, exchanging vehicle information and identification. Mr. Cook did not appear to be hurt and made no mention of any physical injury. Mr. Kang surveyed the damage to both vehicles. He looked at Mr. Cook's truck but could not see any visible damage whatsoever, explaining again that the only point of contact was the trailer hitch. Mr. Kang observed a small dent on the front bumper of his van. In cross-examination, Mr. Kang identified a photograph of a small crease or dent in the van's bumper.
- [12] At trial, the defendants took the position that the force of the impact was relevant to Mr. Cook's vehicle damage claim and his claim for personal injuries arising from the collision. In this regard, the defendants presented expert evidence from Harvey West. I found Mr. West to be an expert in engineering, qualified to give opinion evidence with respect to the severity and magnitude of force, impact speeds, and damage analysis.
- [13] I would summarize the key points in Mr. West's expert opinion as follows. First, based on his examination of Mr. Cook's truck some months after the collision, and his perusal of photographs of Mr. Kang's van, Mr. West noted no structural damage to either vehicle. This led Mr. West to conclude that the forces generated in the collision were minor. Second, working on the assumption that Mr. Kang's van "idled" into Mr. Cook's truck, Mr. West opined that the van was travelling at a speed between 5-10 km/h when the two vehicles came together. Third, taking into account various parameters including the estimated weight of the two vehicles, Mr. West opined that upon impact the occupants of Mr. Cook's truck would have experienced a change in speed between 3-6 km/h. To put this into context, Mr. West explained that a vehicle which drove into a stationary object at "walking speed" of 4 km/h would experience a change of speed of 6 km/h upon impact.

- [14] I accept that Mr. West was an honest witness who made a genuine effort to provide an objective opinion as to the force of impact involved in Collision #1. However, in the final analysis I do not find his opinion of assistance in resolving the live issues in this case, for several reasons.
- [15] First, although the case law supports the proposition that evidence concerning vehicle velocity and force of impact can be logically relevant to the extent of damage resulting from a collision, the weight given to such evidence will obviously depend on all of the circumstances of the case: *Cahoon v. Brideaux*, 2010 BCCA 228 at para. 86. The extent of damage will ultimately be a function of the condition and position of the vehicles and their occupants at the time of the collision. This is particularly so in respect of the extent of physical injury suffered by someone involved in a vehicle collision. Sometimes individuals experience serious physical injuries in relatively low impact collisions, whereas on other occasions individuals involved in high impact collisions suffer little or no physical injury. Thus, evidence with respect to force of impact may be relevant but is by no means determinative. Sometimes such evidence may add little or nothing to the case. In the present matter it is clear from the testimony of both Mr. Cook and Mr. Kang that this was a low impact collision. Mr. West's opinion evidence does not add anything to that general characterization of the degree of force involved.
- [16] Second, in my view many of the premises or assumptions underlying Mr. West's opinion were effectively undermined on cross-examination. Mr. West did not examine Mr. Kang's minivan, and in particular he did not examine the material under the cover of the bumper or the state of the vehicle frame following the collision. Moreover, Mr. West's force calculations were based on manufacturer's specifications as to the weight of the two vehicles, which did not account for their contents at the time of collision. Also, Mr. West assumed all of the forces involved were longitudinal, but acknowledged in cross-examination that the vehicles may have been offset at the time of the collision, meaning that there was likely some degree of latitudinal force involved. Mr. West also assumed that the van drove into the truck at "idling speed", but appeared to accept on cross-examination that the force involved might have been different if both vehicles were moving forward slowly in traffic when the van drove into the truck. These were only some of the issues raised in cross-examination of Mr. West. At bottom, Mr. West agreed that he could only estimate the force involved and could not calculate it with precision.
- [17] Expert evidence of the sort offered by Mr. West might be important in distinguishing between a low impact collision on the one hand and one involving moderate or severe force on the other. However, in this particular case I do not find Mr. West's expert opinion helpful in identifying the precise amount of force involved in what was clearly on all the evidence a low impact collision.

(2.3) Injuries Sustained in Collision #1

- [18] Mr. Cook testified that in the wake of Collision #1, he experienced "constant" neck pain along his right side into the middle of his neck. He also had back pain; from what he could recall at the time of trial some 13 years after the collision, the pain was located in the middle of his back; it prevented him from doing strenuous work. He also had difficulty sleeping in his bed, and had to sleep on the floor, on his stomach. He experienced headaches on a "random" basis; they were "not that bad", and there were not "a ton of them"; he estimated that he got about 15 headaches "over the entire time", although he did not specify the time frame. He suffered from fatigue and insomnia; he had "no energy whatsoever" and "could not sleep at night due to pain". Again, Mr. Cook did not give a time frame for these symptoms. He experienced "anxiety" and "depression" because he was worried about paying bills; he worried about his ability to complete the residential construction endeavour he had started several months before the collision.
- [19] Dr. Kagan, Mr. Cook's family doctor, testified that Mr. Cook made an initial visit to her office on 27 September 2006, one day after Collision #1, complaining of neck and right shoulder pain. I pause here to note that under the rules of evidence, testimony from other witnesses recounting Mr. Cook's subjective reports of pain and other symptoms of injury are not admissible for the truth of their contents to reinforce or bolster Mr. Cook's trial testimony. However, subjective reports made by the plaintiff are sometimes relevant to serve as context for the objective observations noted by treatment providers. All further references to subjective reports made by Mr. Cook must be read with this limitation in mind. Dr. Kagan made objective observations of tenderness in Mr. Cook's right trapezius. In later visits, Mr. Cook made continuing complaints of tenderness in his mid back and left leg. He also expressed concern about right knee pain, which he believed might be a result of walking awkwardly and having bad posture to accommodate for pain in other parts of his body. Dr. Kagan noted that Mr. Cook displayed objective signs of sciatica and awkward posture.
- [20] By way of background, it is necessary at this point to describe Mr. Cook's residential construction undertaking, which began in 2006 and concluded in 2010. In particular, Mr. Cook acquired a lot on Gore Avenue in Vancouver, subdivided it into three lots, constructed three single family homes, and sold all three for a profit. Mr. Cook described himself as the project manager. He hired contractors for various aspects of the project, oversaw the work, and contributed his own labour when able to do so.
- [21] Mr. Cook started the project in the spring of 2006. Mr. Cook testified that he obtained building permits in May of 2006, digging of the foundations got underway in June, and the framing work took place over the latter part of the summer. By August of 2006, the framing for two of the houses was complete. The project then suffered a setback when there was a fire at the site, a suspected arson. After the fire, what remained of the buildings had to be demolished and the framing had to be redone.
- [22] Mr. Cook testified that after Collision #1, on 24 September 2006, he tried to keep working at the construction site, but had difficulty doing so because of his collision-related injuries, particularly neck and back pain. Mr. Cook denied the suggestion put to him in cross-

examination that as the project manager only a small portion of his work involved physical labour. Mr. Cook explained that the more physical labour he could contribute, the more money he could save on construction costs, and the more profit he could add to his bottom line. Mr. Cook testified that in November 2006 his doctor told him to stop working. Thereafter, he kept the project going through subcontractors, but was unable to contribute his own physical labour to the construction effort.

[23] The thrust of Mr. Cook's testimony was that his involvement in the Gore Avenue construction project - more specifically his ability to contribute his own physical labour to the project - was hampered by his injuries in Collision #1. I do not accept this as an accurate representation of the severity and effect of Mr. Cook's collision-related injuries for the following reasons:

- a) There is evidence that at the time of Collision #1, Mr. Cook was suffering from a variety of pre-existing conditions or injuries. Among other things, Mr. Cook had been in previous car accidents in 1994 and 2003. With regard to the 2003 collision, Mr. Cook testified in chief that he missed or had to re-schedule some work due to injuries in that accident, but the effects were not significant. Mr. Cook's law suit for injuries in the 2003 accident settled in 2005, and he testified that he had no ongoing pain or impairment from that collision from that point forward. However, clinical records from Mr. Cook's treating physician suggest otherwise.
- b) In her testimony, Dr. Kagan initially agreed that she was Mr. Cook's family physician since 2006 and did not recall treating him prior to that date. She was then shown clinical records indicating that she had seen Mr. Cook as a walk in patient at the clinic where she worked from 2003 to 2005. Dr. Kagan agreed, based on her review of clinical records, that in March, April, and May of 2004, Mr. Cook was reporting continuing pain in his neck, back, and left shoulder in connection with the 2003 accident. In an appointment with Dr. Kagan on 14 February 2005, Mr. Cook reported that he was still having headaches, perhaps once per week, lasting all day, and he was also experiencing intermittent shoulder pain three times per month.
- c) More generally, medical records from Dr. Kagan's clinic indicate that in 2004 and 2005 Mr. Cook attended with reports of knee pain, a pinched nerve in his neck which caused pain for 10 days, and ongoing shoulder pain and headaches. Based on these records, Dr. Kagan agreed that from 2003 to 2006, up until about one month before Collision #1, Mr. Cook "consistently" reported neck, shoulder, and right knee pain.
- d) Mr. Cook agreed that near the end of June of 2006, he went to the hospital emergency room with a complaint of neck pain. Although this incident occurred a matter of weeks after he broke ground on his construction project, Mr. Cook denied that it was a work-related injury. He claimed to have no memory of how he hurt himself, but maintained that it was not at the work site because if it was, he would have submitted a WCB claim. Dr. Kagan was referred to clinical records indicating that in an appointment on 1 July 2006, Mr. Cook reported that he had to go to the hospital the previous weekend due to neck pain. Her clinical notes indicate,

and I accept as accurate, that Mr. Cook told her he hurt his neck "on the job", "shovelling". Dr. Kagan prescribed oxycodone and lorazepam.

- e) Although Mr. Cook maintained in his testimony that Dr. Kagan advised or instructed him to stop working in November of 2006, Dr. Kagan's evidence does not support that conclusion. Dr. Kagan testified that, in her practice, the patient generally makes his or her own decision about whether to stop working. In Mr. Cook's case, the first reference to Mr. Cook being off work was a clinical note from a visit on 14 December 2006, when Mr. Cook reported that he was "still off work". Dr. Kagan later wrote Mr. Cook a note confirming that he had been off work since 1 October 2006. In her testimony, Dr. Kagan confirmed that in writing this note, she was relying entirely on what Mr. Cook told her. Dr. Kagan did not know Mr. Cook was self-employed, supervising his own construction project. Dr. Cook assumed that when she was asked to write a note to say that Mr. Cook was "off work", he was not working at all, because that is what being "off work" means to her. In an appointment with Dr. Kagan on 6 March 2007, Mr. Cook reported that he "remained off work", that he was "only able to do supervisory" work for which he was "not being paid", and that he was "unable to do his usual labour". Finally, on 7 June 2007, Dr. Kagan noted that Mr. Cook had returned to work in April, on "light duties without lifting", and then had been "back to work since mid-May", with "increased pain at the end of May".
 - f) Mr. Cook's business records show that he was conducting business meetings with tradespeople throughout the time that he had reported to Dr. Kagan that he was "off work". By way of example, Mr. Cook went to a business meeting at a restaurant the day after Collision #1. Similarly, in a doctor's visit on 8 February 2007, Mr. Cook reported that he was "off work"; yet his business records include a 7 February 2007 receipt for dinner with a contractor regarding the "kitchen reno". Mr. Cook also purchased season's tickets for the Canucks in 2007, at a cost some \$16,000, which he recorded as a business expense in connection with his residential construction project. When cross-examined on these records, Mr. Cook acknowledged extensive entertainment and meal expenses in the latter half of 2006 and throughout 2007. With regard to the hockey tickets, Mr. Cook testified that he sometimes gave the tickets to others and sometimes used them himself.
- [24] I draw two factual conclusions from all of this evidence. First, I find as a fact that Mr. Cook was unable to contribute any significant degree of physical labour to the Gore Avenue project due to conditions or injuries that preceded Collision #1. Second, I find that the injuries sustained by Mr. Cook in Collision #1 did not prevent Mr. Cook from carrying on with his role in supervising or overseeing the Gore Avenue project.

(2.4) Treatment after Collision #1

- [25] Mr. Cook testified that after Collision #1, he had ongoing problems with his neck and back, and that he also had difficulty sleeping. Mr. Cook also believes his feet were "turned out" during the 2006 collision, as a result of which he has had problems with his legs and has had to "adjust his gait". With regard to treatment following Collision #1, Mr. Cook testified that in addition to regular visits to Dr. Kagan, he attended physiotherapy once to twice per week.
- [26] Shortly after Collision #1, Mr. Cook started attending for treatment with Andrea Martens, a physical therapist and qualified acupuncturist. She testified that when she started treating Mr. Cook at City Sports Therapy in November 2006, he reported pain in his back, hip, right knee, and for "travelling nerve pain". Ms. Martens continued to treat Mr. Cook when she moved to Urban Active Sport Therapy in 2009.
- [27] When asked to summarize the objective observations made in her clinical records, Ms. Martens testified that she made observations of pain with palpation in affected areas, limited range of motion, and poor posture. Ms. Martens treated Mr. Cook with physical therapy techniques and acupuncture. She also gave Mr. Cook advice and instruction regarding certain home-based exercises. Ms. Martens testified that as a general trend, at the beginning of most treatment sessions Mr. Cook would present with signs of bad posture, pelvis rotation, and stiffness on the right side of his body. At the end of each session, after treatment, Mr. Cook's pelvis would be in a neutral position indicating that he had experienced some relief. The next time Mr. Cook returned for treatment his pelvis would be rotated again; some days were better than others but as a general rule Mr. Cook's pelvis and back would continue to go out of alignment between treatments.
- [28] Mr. Cook's medical history also includes reports of ongoing pain and discomfort in his left knee. In terms of the onset of this condition, Dr. Kagan's clinical notes include a report of left knee pain by Mr. Cook during a visit on 10 November 2008. The plaintiff called Dr. Horlick, an orthopedic surgeon as a fact witness, to give evidence concerning objective observations and treatment of Mr. Cook's left knee. The plaintiff did not tender an expert report from Dr. Horlick, and he was not qualified as an expert to give opinion evidence within the meaning of Part 11 of the Supreme Court Civil Rules, B.C. Reg. 168/2009. However, Dr. Horlick was permitted to draw upon and make reference to his expertise in the field of orthopedics, to explain his observations and treatment of Mr. Cook, as discussed in *Anderson v. Dwyer*, 2009 BCSC 1872 at para. 14. After an initial examination of Mr. Cook in March of 2009, Dr. Horlick performed left knee arthroscopic surgery on 1 May 2009, during which he repaired a torn meniscus and noted thinning cartilage. In a subsequent examination in November of 2009, Dr. Horlick observed that, apart from some post-surgical muscle atrophy in the left leg, Mr. Cook had come out of the surgery with minimal deviation from normal weight bearing posture on his left side.
- [29] On 23 June 2010, some 3.5 years after Collision #1, Mr. Cook also saw Dr. Shuckett, a rheumatologist. Dr. Shuckett was qualified as an expert witness, and her expert opinion on diagnosis, prognosis, and future care is addressed later in these reasons. For present purposes, the import of Dr. Shuckett's evidence is that she made certain objective

observations of Mr. Cook's physical condition during the 23 June 2010 examination. In particular, Dr. Shuckett noted objective signs of tenderness on Mr. Cook's right occiput, trapezius, knee, scapula, sacroiliac, exterior hip, and foot. His right knee range of motion was normal, but his left knee range of motion was limited. His right leg was noted to be approximately one centimeter longer than his left leg. Mr. Cook also displayed limited range of motion and pain with flexion in his neck and lower back, although he presented with normal cervical lordosis, that is, normal curvature of the spine.

(2.5) Collision #2 [Cook v. Doe and ICBC]

- [30] Collision #2 took place on 8 January 2011, at the intersection of Marine Drive and Taylor Way in North Vancouver. Mr. Cook was again driving his Dodge 3500 pickup truck when he was involved in a collision with a red compact car, possibly a Sprint or Geo. Mr. Cook was turning left onto Taylor Way on a green arrow when the other car came through the intersection on a red light. Mr. Cook's truck ran into the rear driver side door of the other vehicle, which had two female occupants.
- [31] Mr. Cook did not ascertain the identity of the driver or owner of the other vehicle involved in the collision, despite some after-the-fact efforts to do so, in circumstances which are explained below. As a result, Mr. Cook named ICBC as a defendant. ICBC does not dispute that the unidentified driver of the red compact car was at fault for the collision, but nevertheless argues that Mr. Cook is not entitled to judgment because he failed to take all reasonable steps to identify the other driver in the collision as required under s. 24(5) of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [IVA].
- [32] After the collision, Mr. Cook exited his truck and went to speak with the driver of the vehicle immediately behind him. He got her name and phone number and wrote it down on a piece of paper. Meanwhile, the two female occupants in the other vehicle involved in the collision were on the opposite side of the road, separated from Mr. Cook by at least one lane of traffic. Mr. Cook testified that he could not approach them immediately because it was not safe to do so, as traffic had resumed through the intersection.
- [33] Mr. Cook therefore got into his truck with the intention of re-positioning it to, in his words, "clear the intersection". He considered it unsafe to leave his truck in the intersection indefinitely. Mr. Cook turned the corner, drove about half a block ahead, and stopped in the parking lot of a restaurant, at which point he tried to make contact with the driver of the other vehicle involved in the collision. However, to Mr. Cook's chagrin, the driver of the other vehicle left the area, driving up Taylor Way. Mr. Cook immediately phoned 911 and made a report that the other party involved in the Chad driven away.
- [34] Mr. Cook was cross-examined at length about his actions in the aftermath of Collision #2, and in particular on the details surrounding his efforts to identify the driver of the other vehicle at the scene. Mr. Cook maintained that he did not approach the occupants of the red car at the scene because they were on the other side of the road, across one lane of traffic, and he could not reach them safely. Mr. Cook admitted on cross-examination that there

were other people standing with or around the occupants of the red car, but explained that he did not see where these people came from, suggesting they may have been on the opposite side of the road and might not have had to cross through any traffic.

- [35] When pressed on details, Mr. Cook said the occupants of the red car were 15 to 20 feet away. At one point in his testimony Mr. Cook said the occupants remained in the red car throughout, but he then admitted saying in his examination for discovery evidence that the occupants of the other vehicle may have gotten out of their car at the scene.
- [36] Mr. Cook admitted that he had a pen and paper with him, which he used to take down the particulars of the driver behind him as a potential witness to the collision. Nonetheless, he did not make a note of the license plate of the red car, explaining that he could not see the license plate from his position across at least one lane of traffic. The red car was only about 15 to 20 feet away, but it was facing northbound, while his was facing westbound, and he could not see the plate from his position. Mr. Cook disagreed with the suggestion that he could have walked across the road or re-positioned himself to see the car's license plate.
- [37] Mr. Cook agreed that in his examination for discovery he said both vehicles involved in the collision remained at the scene for at least one or two minutes, but I conclude based on an assessment of all the evidence that it must have been longer than that. Mr. Cook testified that the parties in the red car were still at the scene when he spoke with the motorist behind him. There is also evidence that one or more by-standers interacted with the occupants of the red car at the scene, probably during the time that Mr. Cook was speaking with the motorist behind him. I further find as a fact that the other vehicle involved in the collision did not depart the scene until after Mr. Cook repositioned his truck in the restaurant parking lot. This conclusion fits with the sequence of events as recounted by Mr. Cook in his testimony: he repositioned his truck to the parking lot, he saw that the red car leave the area driving up Taylor Way, and he then called 911 to report the incident.
- [38] At this point I must note that there were serious issues with Mr. Cook's credibility as a witness, causing me to approach the entirety of his testimony with skepticism. I will discuss these credibility issues in detail below. Despite those concerns, I accept Mr. Cook's evidence on this particular issue, that is, his actions in the aftermath of Collision #2, as credible and reliable. Mr. Cook had a good recollection of his own actions on the date in question. And although he was frequently combative and argumentative in cross-examination, I find that his testimony on this particular aspect of the case was credible. His testimony was rational and made sense. Importantly, at the time of these events it would have been in Mr. Cook's best interests to identify the driver of the other vehicle involved in the collision, and I am satisfied that in his testimony he accurately described the circumstances in which he says he was unable to do so. Indeed, Mr. Cook testified that when he realized that the red car had driven away before he could identify the driver, he phoned 911 and waited for the police to attend. He was not challenged on that point in cross-examination.

- [39] Mr. Cook testified that in the days after the collision he took steps to ascertain the identity of the other party involved. In particular, he arranged through his lawyer for signs to be posted in the vicinity of the collision, advertising for witnesses who might be able to identify the other vehicle or its driver. These efforts were unsuccessful. Mr. Cook was not challenged in cross-examination on this point.

(2.6) Injuries Sustained in Collision #2

- [40] Mr. Cook testified that following Collision #2, he experienced pain in his neck, back, shoulders, and legs. Immediately after the collision, he felt soreness in his back, forcing him to hunch over from pain at the scene. He also started to experience shooting pain in his legs, while still at the collision scene. With regard to his neck, Mr. Cook believed his prior injury was "aggravated", although the location of the pain was in "different spots" and changed from time to time. He also testified that both his left shoulder and his right shoulder "bothered him" after Collision #2.
- [41] Dr. Kagan testified that she saw Mr. Cook on 10 January 2011, two days after Collision #2. At that time, Mr. Cook reported pain in his right neck, low back radiating into the legs, and right knee. Dr. Kagan made objective observations of spasms and limited range of motion in Mr. Cook's neck. She also saw indications of pain in Mr. Cook's back with movement. In subsequent visits to Dr. Kagan, Mr. Cook reported neck, upper back, mid back, low back, and right knee pain, as well as paresthesia - a tingling or prickling sensation - radiating into his feet. Dr. Kagan made observations of misalignment of Mr. Cook's pelvis.

(2.7) Treatment after Collision #2

- [42] Mr. Cook testified that from 2011 to 2015, his neck, back, shoulders, and legs continued to hurt. Over the course of this time span, he felt some improvement but did not feel that his injuries had fully healed.
- [43] Mr. Cook received separate, parallel courses of treatment from two separate physiotherapy clinics from 2011 to 2015. First, Mr. Cook continued to receive physiotherapy treatments from Ms. Martens as described above up until June 2015. I summarized the nature of the treatment provided by Ms. Martens, and the objective observations made by her, in an earlier section of these reasons.
- [44] Second, commencing in December 2013, Mr. Cook started to attend physiotherapy sessions with Mr. Leyland-Harris at Level 10 Fitness. Mr. Leyland-Harris testified that during his treatment sessions, he made observations that Mr. Cook had: (i) a noticeable left pelvic upslip, meaning that the left side of his pelvis was noticeably higher than the right side of his pelvis, (ii) restricted range of motion in his neck, thoracic spine, lumbar spine region, (iii) rounded shoulders, (iv) a noticeable rotation of his posture, sometimes to the right, sometimes to the left, (v) restricted ankle flexion, and (v) a stiff right foot, rolled inward. Mr. Leyland-Harris treated Mr. Cook with a number of techniques including dry needling, active release therapy, intra muscular stimulation, and joint mobilization. Mr. Leyland-Harris also

oversaw a strength and conditioning regimen administered by Mr. Cook's personal trainer, Carl Bergstrom.

- [45] In cross-examination, Mr. Leyland-Harris confirmed that Level 10 is an "elite training facility" in North Vancouver. Mr. Cook's former personal trainer, Mr. Bergstrom, is now the strength and conditioning coach for Golden State Warriors.
- [46] Mr. Leyland-Harris agreed that over the duration of the treatment, Mr. Cook continued to have a noticeable pelvic upslip, such that at the end of this time frame he was in more or less the same condition that he was in when Leyland-Harris first started treating him. At the beginning of a particular treatment session, Mr. Cook would present with an upslip and bad posture, which would then show notable improvement at the end of the session. However, the upslip and poor posture would be apparent when Mr. Cook attended for his next treatment session. Mr. Leyland-Harris also noted that Mr. Cook's posture and alignment problems migrated to different parts of his body over time.

(2.8) Collision #3 [Cook v. Le and Huynh]

- [47] Collision #3 took place on 28 January 2015, near the intersection of Canada Way and Burriss Street in Burnaby. Mr. Cook was driving his Ford F-150 pickup truck south on Canada Way, up the hill. As Mr. Cook slowed his truck while approaching some construction work on the road ahead of him, he was hit from behind by a Honda Civic, which impacted the rear driver's side of his truck as it drove past. The Civic continued on to the next block and then pulled over on a side street.
- [48] The Civic was driven by defendant Thi Truc Le and owned by her brother, the defendant Anh Tuan Huynh. The driver, Ms. Le, testified at trial that as she drove along Canada Way, intending to switch lanes, she underestimated the distance to Mr. Cook's truck, which was stopped in the lane directly ahead of her. After impacting the left rear corner of Mr. Cook's truck, Ms. Le followed through with her lane change and drove past the truck.
- [49] After the collision, Mr. Cook and Ms. Le both drove one block forward and pulled over on a side street, where they met and exchanged information. Ms. Le testified that Mr. Cook was responsive and appeared unhurt, although she did not specifically ask him if he had been injured in the collision. The 2001 Honda Civic Ms. Le was driving was towed from the scene. It was her brother's car and she never saw it again. She believes it was written off.

(2.9) Injuries Sustained in Collision #3

- [50] Mr. Cook testified that following Collision #3, he experienced headaches and pain in his neck, right shoulder and shoulder blade, mid-back, and right foot. He described the headaches as a very tight feeling between his temples, lasting as long as two hours at a time. He described the neck pain as an aggravation or worsening of pain from the prior collisions, running into his right shoulder and shoulder blade. He described the back pain as a feeling that he had been hit by a baseball bat, and the foot pain as a kind of numbness in his heel that affected his gait. Mr. Cook also claimed that as a result of Collision #3 he experienced

"shock" and "anxiety", although he did not explain precisely what that entailed or how it affected him.

- [51] Dr. Kagan saw Mr. Cook on 3 February 2015, less than one week after Collision #3. Mr. Cook presented with complaints of pain in his right foot, his knees, hips, thighs, gluteus muscles, low back, and neck. Dr. Kagan observed bruising on Mr. Cook's legs and noted indications of stiffness and pain with movement of the neck and back. In subsequent visits Mr. Cook reported insomnia, neck, upper back, shoulder, and right foot pain.

(2.10) Treatment after Collision #3

- [52] Mr. Cook testified that after Collision #3, he continued to see the doctor regularly, continued with physiotherapy, and exercised as recommended by his treatment providers. The viva voce testimony and clinical records of Ms. Martens and Mr. Leyland-Harris indicate that Mr. Cook continued to receive physiotherapy treatments from both of them until June of 2015, when he stopped treatment with Ms. Martens. From July 2015 onward, Mr. Cook continued to see Mr. Leyland-Harris at Level 10 Fitness. In December 2015, Mr. Leyland-Harris moved to Coast Performance and Rehabilitation, and Mr. Cook followed him there. Throughout this time, Mr. Leyland-Harris continued to provide more or less the same types of treatment with more or less the same results as he had in prior time periods.

(2.11) Collision #4 [Cook v. Dempster]

- [53] Collision #4 took place on 25 November 2016, on the Dollarton Highway in North Vancouver. Mr. Cook was driving his Ford F-150 pickup truck southbound on the on-ramp to the Iron Worker's Memorial Bridge. He was in the merge lane, slowing for traffic at the yield sign, when he was hit from behind by a Kia Forte.
- [54] The defendant Bailey Dempster was the driver and owner of the Kia Forte that rear ended Mr. Cook's truck in Collision #4. In her trial testimony, Ms. Dempster explained that she did a shoulder check before switching lanes, but then "made a mistake" by taking her foot off the brake and placing it on the accelerator. She did not realize how close she was to the truck in front of her. She "skidded into the bumper" of Mr. Cook's truck. In cross-examination, she clarified that her vehicle made contact with the trailer hitch and left side of the rear bumper on Mr. Cook's truck. Ms. Dempster estimated that her vehicle was not going any faster than 10 km/h at the point of impact, although she conceded in cross-examination that she was not looking at her speedometer at the time.
- [55] After the impact, both vehicles came to a full stop. As Ms. Dempster was getting out of her vehicle to go and speak with Mr. Cook, a police officer several cars behind her activated his emergency lights and instructed both drivers, Ms. Dempster and Mr. Cook, to clear the intersection. Mr. Cook's Ford F-150, Ms. Dempster's Kia Forte, and the police vehicle then drove in tandem across the bridge and stopped on the Vancouver side, where Ms. Dempster and Mr. Cook exchanged information.

[56] In speaking with Mr. Cook after the collision, Ms. Dempster was emotional. She apologized to Mr. Cook, who seemed calm but expressed frustration, indicating that it was his fourth car accident. Mr. Cook was alert and responsive during the conversation. He was not in any apparent pain or distress.

[57] Ms. Dempster did not pay for any repairs to her vehicle, which she was still driving at the time of trial some three years after the collision. In cross-examination, she agreed that to her knowledge no one ever removed the front bumper to see if there was damage to the material underneath it. In terms of damage to Mr. Cook's truck, Ms. Dempster confirmed that her car impacted the left side of the bumper and the trailer hitch as depicted in photographs shown to her during her trial testimony.

(2.12) Injuries Sustained in Collision #4

[58] Mr. Cook testified that when Collision #4 occurred, his head and neck hurt more or less right away. He further testified that in addition to head and neck pain, he experienced aggravation of the symptoms in his back, shoulders, legs and right foot. He testified that he went to see the doctor immediately.

[59] When Dr. Kagan saw Mr. Cook on 30 November 2016, five days after Collision #4, he reported headaches, as well as pain in his right foot, knee, and leg, into the lower back, mid back and neck, and right shoulder. In subsequent visits Mr. Cook reported ongoing symptoms in his neck, shoulders, upper and lower back, gluteus muscles, hips, knees, and feet. Mr. Cook reported an increase in neck pain and headaches, and aggravation of prior conditions. Neither Dr. Kagan's clinical notes nor her expert report reflect any objective observations made during this visit.

(2.13) Treatment after Collision #4

[60] Mr. Cook testified that after Collision #4, he continued to see Dr. Kagan at regular intervals, continued to attend physiotherapy, and exercised regularly as recommended by his treatment providers. The viva voce testimony and clinical records of Mr. Leyland-Harris confirm that Mr. Cook continued to attend weekly physiotherapy sessions at Coast Performance and Rehabilitation Clinic from December 2016 all the way through to the time of trial in the fall of 2019.

(2.14) Follow-Up Examination by Dr. Horlick

[61] Dr. Horlick, the orthopedic surgeon who performed arthroscopic surgery on Mr. Cook's left knee in February 2009, gave evidence about a follow up examination on 5 September 2019. At that time, Mr. Cook showed no signs of pain through a full range of motion in his left knee, and the signs of atrophy he had observed several months after surgery were gone. In cross-examination, Dr. Horlick testified that his orthopedic examination of Mr. Cook's back and neck did not result in any noteworthy objective observations.

(2.15) Mr. Cook's Current Physical Condition

[62] Mr. Cook is now 52 years old. He testified that as of the date of his trial which commenced in September 2019, he continued to experience headaches and pain in his neck, shoulder, back, legs, and right foot. He testified that he has "many different symptoms" which can change daily and can last for days at a time. Sometimes he has pain in the back of his head, or pain in his neck radiating into his back, or pain in his mid back. He often does not sleep well, and wakes up in the morning with stiffness and soreness.

(2.16) Expert Evidence as to Diagnosis, Prognosis, and Treatment

[63] The plaintiff presented expert opinion evidence from: (i) Mr. Cook's treating family physician Dr. Kagan, (ii) a rheumatologist, Dr. Shuckett, and (iii) a functional capacity evaluator, Nick Lauder. The defendants tendered expert opinion evidence from (iv) Dr. Hirsch, a physiatrist, and (v) Dr. O'Shaughnessy, a forensic psychiatrist.

(2.16.1) Expert Opinion Evidence of Dr. Kagan

[64] The plaintiff tendered an expert report completed by Dr. Kagan on 1 May 2019. I recognized Dr. Kagan as an expert in family medicine qualified to give opinions in relation to diagnosis, treatment, and prognosis for general medical conditions and injuries including consequences of trauma and managing chronic conditions.

[65] Dr. Kagan's report indicates that she has been Mr. Cook's treating family physician since 2006. Dr. Kagan saw Mr. Cook within a few days of each of the four collisions which are the subject of this action, and Mr. Cook had follow up appointments with her at regular intervals in between each of these events.

[66] In her expert report, Dr. Kagan diagnosed Mr. Cook with "multiple soft tissue injuries" and "right sided sciatic symptoms", leading to "pain and disability". In Dr. Kagan's view, Mr. Cook is disabled due to an inability to work in the construction industry, which he had been doing without any apparent limitation prior to the subject collisions. Dr. Kagan was unable to comment on whether Mr. Cook's left knee problems, namely a surgically repaired meniscus tear and a degenerative knee condition, were causally connected to the collisions.

[67] In terms of prognosis, Dr. Kagan opined that Mr. Cook would likely have an "ongoing disability", making it unlikely that he will return to any significant full time employment, even with limitations. Dr. Kagan further opined that Mr. Cook would likely have to avoid physically demanding household tasks.

[68] With regard to future care, Dr. Kagan's report states that with treatment, including analgesics, physiotherapy, and active rehabilitation, Mr. Cook can be expected to improve his functional abilities to "do more", "walk further", "sit longer", and "experience less pain". However, even with these interventions, Mr. Cook will "continue to experience ongoing sequelae with pain and secondary disability".

- [69] Dr. Kagan did not opine on the psychological effects of the collisions, although she did speak with Mr. Cook about the psychological effects of his litigation, and insomnia related to both stress and musculoskeletal complaints.
- [70] In cross-examination, Dr. Kagan conceded a number of points impacting on the soundness of her assumptions, the reliability of her analysis, and ultimately the weight to be given to her opinion. In particular:
- a) Dr. Kagan agreed that she had been Mr. Cook's family physician since 2006 and did not recall treating him before then. She was shown records indicating that she treated Mr. Cook as a walk in patient at the clinic where she worked in 2003 and 2004. After extensive cross-examination in these records, Dr. Kagan agreed that from 2003 up to 2006, within one month of Collision #1, Mr. Cook consistently reported neck, shoulder, and right knee pain.
 - b) Dr. Kagan agreed that medical history is extremely important because it puts a patient's current or existing complaints in context. She further agreed that in Mr. Cook's case, in preparing her report dated 1 May 2019, she had forgotten about the treatment history prior to Collision #1. She therefore conceded in cross-examination that her assumption that Mr. Cook had no pre-existing complaints or problems was not accurate.
 - c) When questioned about the details of the pre-2006 clinical records, Dr. Kagan agreed that many of Mr. Cook's reports for periods preceding Collision #1 involved subjective complaints that were similar to and sometimes exactly the same as his complaints following Collision #1 and subsequent collisions. These subjective complaints included reported pain in the neck, sciatica, and reported knee problems.
 - d) Regarding Mr. Cook's work history, the statement in Dr. Kagan's report that Mr. Cook was working in construction came from Mr. Cook himself. Dr. Kagan agreed that Mr. Cook did not consult with or obtain advice from her about whether to go off work. Mr. Cook asked for a note saying he had been off work since 1 October 2006, and Dr. Kagan obliged, relying entirely on what Mr. Cook told her.
 - e) Dr. Kagan did not know who Mr. Cook was working for at time of Collision #1; she did not recall at the time of her testimony that Mr. Cook was self-employed, supervising his own construction project. When Mr. Cook reported to her that he was not working, her assumption was that he was not working at all, meaning he was not doing any work for pay.
 - f) When shown business receipts indicating that Mr. Cook continued to meet frequently with tradespeople throughout late 2006 and all of 2007, Dr. Kagan said she was not aware that Mr. Cook was conducting business meetings at that time; Dr. Kagan testified that she had no idea that this kind of activity was going on at the time she wrote a note to say Mr. Cook was not working.

- g) Dr. Kagan agreed that although she continued to see Mr. Cook as a patient on a regular basis, she had not conducted any physical examination of him nor did she make any objective observations of his condition in the past four years, from 2016 up to and including 2019.
- h) With regard to future care, Dr. Kagan's report noted that after the collisions, Mr. Cook was involved in "strengthening exercises at the gym". Dr. Kagan agreed that Mr. Cook had in fact been going to gym before the collisions, but added that this might not have involved the same kind of activity as the post-collision strengthening exercises.
- [71] My conclusions with respect to Dr. Kagan's opinion are as follows. First, I have been given no reason to question her credibility, and I find that her report and viva voce testimony were given honestly in a genuine effort to meet her duty to the court as an expert witness. With regard to the substance of her evidence, I do have some concerns with the reliability of Dr. Kagan's analysis. These concerns impact on the weight that I am prepared to attach to her opinion.
- [72] I accept Dr. Kagan's general opinion that Mr. Cook suffered "multiple soft tissue injuries" and "right sciatic symptoms" as a result of all four collisions, but I find that this opinion must be qualified by the fact that Mr. Cook had a number of pre-existing unresolved complaints. I find it noteworthy that in her report and at the beginning of her trial testimony, Dr. Kagan appeared to have overlooked the fact that she treated Mr. Cook as a walk-in clinic patient for a period of years before Collision #1. The clinical records over that time frame reveal a history of notable symptoms preceding Collision #1.
- [73] I cannot accept Dr. Kagan's opinion that Mr. Cook suffered any kind of identifiable disability, for a number of reasons. For one thing, the statements in Dr. Kagan's report appeared to be written on the assumption that prior to the collision Mr. Cook was a construction labourer. Dr. Kagan's report does not acknowledge that Mr. Cook was a self-employed individual whose primary role was to supervise or direct various contractors working on his residential development project. Dr. Kagan did not direct Mr. Cook to go off work, but merely back-dated a letter confirming that he was off work, in circumstances where I find that his work on the Gore Avenue project was more or less the same both before and after Collision #1. For the same reason, I cannot accept Dr. Kagan's opinion that Mr. Cook will continue to have an "ongoing disability" making it unlikely that he will return to any significant full time employment.
- [74] With regard to future care, I accept Dr. Kagan's opinion that with continued treatment through analgesics, physiotherapy, and active rehabilitation, Mr. Cook can be expected to improve his functional abilities to "do more", "walk further", "sit longer", and "experience less pain". However, once again I reject Dr. Kagan's suggestion, referenced in the portion of her report dealing with future care, that Mr. Cook will experience ongoing "secondary disability". In general, I find the expert opinion evidence of Dr. Shuckett, discussed below, to be more reliable, more specific, and consequently more valuable to me in assessing the nature and extent of Mr. Cook's injuries and their effects.

(2.16.2) Expert Opinion Evidence of Dr. Shuckett

- [75] Dr. Shuckett was presented as an expert in rheumatology. I found her qualified to give opinion evidence with respect to general medical conditions, and in particular the etiology, diagnosis, treatment, and prognosis of pain conditions, arthritis, neck and back conditions, hip and knee conditions, and musculoskeletal injuries and conditions.
- [76] Dr. Shuckett prepared an expert report dated 20 July 2010, following a physical examination of Mr. Cook on 23 June 2010, and a review of his medical records to that date, some 3.5 years after Collision #1. In her physical examination, the details of which are set out in paragraph 29 above, Dr. Shuckett noted signs of tenderness on Mr. Cook's right side and limited range of motion with pain upon flexion in his neck and lower back. She saw no indicia of non-organic pain.
- [77] Dr. Shuckett diagnosed Mr. Cook with the following conditions, as reflected in her expert report and clarified in cross-examination:
- a) Whiplash, i.e., musculoligamentous neck injury, and myofascial pain in trigger points in the right neck and shoulder, with some evidence of pre-existing conditions that were exacerbated by Collision #1. In cross-examination, Dr. Shuckett agreed that Mr. Cook had pre-existing sources of pain. She opined that Collision #1 contributed to Mr. Cook's myofascial pain but was unable to offer an opinion on the extent of contribution. Nonetheless, she maintained her position that Collision #1 exacerbated Mr. Cook's pre-existing conditions. Dr. Shuckett also opined that Mr. Cook had a likely or probable predisposition to further neck and back injuries due to the cumulative effect of his prior collisions in 1994 and 2003.
 - b) Mechanical low back pain, musculoligamentous in nature, caused by Collision #1. In this regard, Dr. Shuckett noted a herniated disc which may have been caused by Collision #1 or may be incidental. Dr. Shuckett also noted right sided sciatica, although she saw no evidence of nerve dysfunction.
 - c) Bilateral knee pain, most likely due to patellar tendonitis and patellar femoral syndrome. In Dr. Kagan's opinion, Mr. Cook's right knee pain was likely attributable to the collision. By contrast, his left knee pain did not emerge until some two years after the collision and may have been unrelated, attributable in part or principally to a torn left meniscus. In cross-examination, Dr. Shuckett agreed that one of Mr. Cook's main complaints was left knee pain, which she ultimately did not attribute to the subject collision.
- [78] In terms of prognosis, Dr. Shuckett's opinion was that as of 20 July 2010, some 3.5 years after Collision #1, Mr. Cook had likely attained maximum medical improvement. The prognosis for a full recovery was "poor", taking into account Mr. Cook's predisposition to injury due to prior collisions in 1994 and 2003, and the subsequent effects of Collision #1.

- [79] With regard to future care, Dr. Shuckett suggested epidural steroid injections to address pain from the herniated disc, but did not make any further recommendations for future treatment.
- [80] As noted, Dr. Shuckett's initial examination and report were completed in 2010, in the wake of Collision #1. In a follow-up examination of Mr. Cook on 5 September 2019, Dr. Shuckett made physical observations of tenderness in the right neck and shoulder girdle, and also to a lesser degree on the left side, and decreased range of motion in Mr. Cook's shoulders and low back. She once again observed no indicia of non-organic pain.
- [81] In cross-examination, Dr. Shuckett agreed that many of the underlying records consulted in her initial report (now some 10 years old) have since been destroyed. She conceded some difficulty recalling Mr. Cook's circumstances, but maintained that some of the details came back to her after she read her report. Dr. Shuckett acknowledged that without access to her 2010 report she would not have remembered any of the details or even recognized Mr. Cook.
- [82] Dr. Shuckett agreed with counsel for the defendants that in conducting an assessment, the subject's reporting is critical. She testified that she will generally rely upon information and reporting from subject unless there is some specific reason to doubt it. In this regard, she generally accepts what a subject says about subjective pain experienced during an examination. For example, observations of tenderness on palpation are dependent upon the subject's report of tenderness, and in the absence of some specific reason to doubt these reactions, Dr. Shuckett will generally take them into account in formulating her opinion. It should be recalled that Dr. Shuckett observed no indicia of non-organic pain during either of her examinations of Mr. Cook.
- [83] Dr. Shuckett considered Mr. Cook's account of his prior collisions and his pre-collision ulnar nerve treatments to be somewhat vague. She was also unaware of Mr. Cook's prior WCB claim, including the fact that he had been on disability for an extended period of time. She only became aware of some of Mr. Cook's prior injuries from her review of medical records, including records referencing a prior leg injury from an arrest, and a prior hospital visit for neck pain. Dr. Shuckett agreed that there were "gaps" in the information provided by Mr. Cook.
- [84] Dr. Shuckett confirmed, as stated in her report, that Mr. Cook had pre-existing complaints bearing some similarity to the symptoms she attributed to Collision #1. Dr. Shuckett's opinion was that Collision #1 contributed to Mr. Cook's existing symptoms, but she was unable to say to what extent. In other words, Dr. Shuckett was unable to offer an opinion on the extent to which Mr. Cook's pre-existing conditions were impacted by the subject collision, that is, Collision #1.
- [85] Finally, Dr. Shuckett was unable to comment on the extent to which Collision #1 impacted on Mr. Cook's ability to do construction work. She was unaware of extent of construction work Mr. Cook did prior to the collision, but she assumed it was full time.

- [86] Overall, I found Dr. Shuckett's opinion evidence to be balanced, objective, and well-reasoned and I accept her conclusions with respect to the nature, severity, duration, and prognosis of Mr. Cook's injuries in connection with Collision #1.
- [87] It is true that Dr. Shuckett's expert report was prepared almost ten years ago, her underlying records have been destroyed, and she had little independent recollection of Mr. Cook's case. Dr. Shuckett conceded in cross-examination that all of this limited her ability to recall the details of Mr. Cook's case; she added that after reviewing her report and conducting a follow-up examination on 5 September 2019, some of the details came back to her. I have taken all of this into account, although I note that Dr. Shuckett was able to answer most of the questions put to her in cross-examination without any significant limitations due to lack of memory or passage of time. And, on the other side of the coin, since Dr. Shuckett's report was in fact prepared closer in time to Collision #1 (some 3.5 years after the event) than much of the other material placed before the court, I have some confidence that the report together with evidence elicited on cross-examination furnish an accurate picture of Mr. Cook's injuries arising from that collision.
- [88] The principal limitation of Dr. Shuckett's opinion is that it focused more or less exclusively on Collision #1. As far as Collisions #2 through #4 are concerned, Dr. Shuckett's report serves only as a baseline against which to consider more recent evidence.

(2.16.3) Expert Opinion Evidence of Mr. Lauder

- [89] Mr. Lauder is a kinesiologist and occupational therapist. I recognized him as an expert in occupational therapy, work capacity evaluation, and functional capacity evaluation, qualified to give opinion evidence with respect to (i) assessment, rehabilitation, remediation of physical function within the field of occupational therapy, (ii) physical disabilities related to employment requirements and rehabilitation and remediation of same within the field of occupational therapy, and (iii) costs of future care.
- [90] Mr. Lauder conducted a functional capacity assessment of Mr. Cook on 30 April 2019. Mr. Cook exhibited a high level of effort during testing, with some inconsistencies in the accuracy of his subjective reports, and some tendency to focus on limitations rather than on functional abilities. In Mr. Lauder's opinion, Mr. Cook reported somewhat higher levels of disability than those observed in testing.
- [91] Mr. Lauder offered an opinion that, occupationally, Mr. Cook is not physically capable of meeting all of the job demands of his stated pre-collision occupation as a "construction worker". He is presently unable to work at his pre-collision functional capacity. More specifically, Mr. Cook is limited in sustained overhead reaching, sustained neck extension, and sustained kneeling and stooping. In the construction trade, Mr. Cook would require assistance from co-workers in addition to or together with modifications to his job demands and schedule. More generally, he has limitations for working in occupations beyond certain physical strength, endurance, range of motion parameters. Recreationally, Mr. Cook is limited in activities that require stopping. Domestically, Mr. Cook is able to do basic

housework but is limited in his ability complete heavier or more arduous tasks such as seasonal yard work and household maintenance and repair.

[92] In cross-examination:

- a) Mr. Lauder agreed that he was unable to ascertain the extent to which the functional limitations described above could be attributed to each of the four collisions, or to prior or intervening injuries or conditions.
- b) In terms of the diagnosis of Mr. Cook's conditions, Mr. Lauder relied primarily on the opinion of Mr. Cook's treating physician, Dr. Kagan.
- c) Relying upon Mr. Cook's stated occupation as of "the date of loss" for Collision #1, Mr. Lauder conducted his functional capacity analysis on the basis of whether Mr. Cook had the capacity to perform all the tasks of a construction worker. Mr. Lauder did not consider whether Mr. Cook was capable of working as a supervisor on a construction project.
- d) Mr. Lauder agreed that his opinion only goes as far as to say that Mr. Cook is not capable of meeting the requirements of a construction job with heavy physical demands. This does not mean Mr. Cook lacks the capacity to do work of any kind. For example, Mr. Lauder did not consider whether Mr. Cook had the capacity to work in the film industry or as a by-law officer.
- e) Mr. Lauder was unaware that Mr. Cook had made WCB claims or had previously been off work for any period of time in connection with WCB claims.
- f) Mr. Lauder noted that Mr. Cook's range of motion in the neck, back, shoulders, and legs were all within normal parameters. Mr. Cook's function was well above industry standards for construction workers in relation to a number of activities including walking, stair climbing, and kneeling. The only standards he failed to meet were overhead reaching and balance. In giving this testimony, Mr. Lauder clarified that measurements of industrial standards can be misleading because they are based entirely on speed. Mr. Lauder also clarified in re-examination that although Mr. Cook did the tests quickly, he displayed "compensatory behaviours".

[93] Mr. Lauder also prepared a costs of future care report, the particulars of which will be addressed when reviewing Mr. Cook's claim for costs of future care. For present purposes, I will simply note the following points.

[94] First, with regard to medication costs, since Mr. Lauder was not in a position to opine on causation, he was unable to say which of the drug costs listed on his report would be required to treat Mr. Cook's collision-related injuries.

[95] Second, with regard to occupational therapy and physiotherapy, Mr. Lauder agreed that future treatment under these categories should be time-limited. Mr. Lauder testified that he made recommendations for occupational therapy and physiotherapy plans of specified frequency and duration. Insofar as occupational therapy is concerned, Mr. Lauder's costs of

future care report recommends six to eight sessions, plus one session for assessment of home care needs, classified as one-time "fixed costs", for a total cost ranging from \$1,554 to \$1,998. However, with respect to physiotherapy, Mr. Lauder's report is ambiguous as to duration of treatment. It recommends weekly sessions at an annual cost of \$4,800 per year, classified as a "fixed cost", without specifying any duration. In support of this recommendation, Mr. Lauder's report cites the opinion of Dr. Kagan and input from Mr. Leyland-Harris, both of whom testified at trial. Dr. Kagan indicates that physiotherapy would be of benefit to Mr. Cook in managing "acute spam flares and pain", with no specification as to the duration of treatment. The input from Mr. Leyland-Harris was that Mr. Cook would benefit from "once a week treatment for the foreseeable future to manage his acute spasms and pain". Thus, while Mr. Lauder agreed in cross-examination that Mr. Cook's physiotherapy should be time-limited, the costs of future care report does not propose a treatment time frame.

- [96] Third, when asked about Mr. Cook's prior use of a personal trainer, Mr. Lauder was unaware that Mr. Cook had spent some \$24,000 on a personal trainer from 2011 to 2013. Mr. Lauder did not support or recommend personal fitness training at that level and could not comment on the value or utility of the personal trainer services previously received by Mr. Cook.
- [97] Fourth, Mr. Lauder maintained his recommendation that Mr. Cook should receive an annual gym membership as set out in his report. Mr. Lauder recommended a gym membership to address and treat "all of the limitations" observed in the functional capacity evaluation.
- [98] My conclusions with respect to Mr. Lauder's opinion evidence are as follows:
- a) I accept that Mr. Lauder made a genuine effort to offer an objective opinion regarding the extent to which Mr. Cook has suffered an impairment of his functional capacity, both in the work place and in other aspects of his life.
 - b) However, I find Mr. Lauder's key conclusion regarding occupational capacity - namely that Mr. Cook is unable to meet the physical demands of his occupation as a construction worker - to be unhelpful and inapt because it rests on an inaccurate description of Mr. Cook's occupation as explained below.
 - c) Mr. Lauder conducted his entire functional capacity analysis on the premise that Mr. Cook's occupation was that of a construction worker. In fact, Mr. Cook has never worked in the capacity of a construction worker, at any point before or after Collision #1. At the time of Collision #1, Mr. Cook was a self-directed supervisor of a residential construction project. He contributed physical labour, when he could, in hopes of increasing his profit margin.
 - d) Mr. Lauder expressly conceded in cross-examination that his functional capacity opinion was focused exclusively on Mr. Cook's capacity to meet the requirements of a construction job with heavy physical demands. The corollary of this is that Mr. Lauder could not say Mr. Cook lacked the capacity to do other kinds of work.

- e) I note Mr. Lauder's observation that during his functional capacity evaluation on 5 April 2019, Mr. Cook's range of motion in the neck, back, and shoulders, and legs were all within normal parameters. This is potentially inconsistent with the evidence of Dr. Shuckett, who testified that in her most recent examination of Mr. Cook on 5 September 2019 she made objective observations of decreased range of motion in Mr. Cook's shoulders and low back. However, I would attribute this difference to the fact that both Mr. Lauder's functional capacity assessment and Dr. Shuckett's follow-up examination were nothing more than "snap shots" of Mr. Cook's physical condition and presentation on the dates in question. Mr. Cook's care providers testified about changes in his physical presentation and posture at the beginning and end of each treatment session. It is therefore not surprising that on some occasions Mr. Cook may present with limited range of motion and on other occasions he may present with little or no such restrictions.
- f) I accept Mr. Lauder's opinion that (i) recreationally, Mr. Cook is limited in activities that require stopping, and (ii) domestically, he is limited in his ability to complete heavier or more arduous tasks such as seasonal yard work and household maintenance and repair.
- g) I accept Mr. Lauder's opinions concerning costs of future care, subject to the limitations and qualifications set out at paragraphs 94 to 97 above.

(2.16.4) Expert Opinion Evidence of Dr. Hirsch

- [99] Dr. Hirsch was called by the defendants as an expert in physical medicine. I ruled that Dr. Hirsch was qualified to provide opinion evidence with respect to the diagnosis, medical management and rehabilitation of persons with disorders or injuries of the spine, brain, neurological and neuromuscular systems, musculoskeletal conditions and injuries, and neurological and musculoskeletal pain syndromes.
- [100] Dr. Hirsch conducted an interview and physical examination of Mr. Cook on 25 March 2019 and completed an expert report on the same date. Dr. Hirsch's report notes that in the interview, Mr. Cook would not volunteer any information about his health or function prior to Collision #1, taking the position that this personal information was not relevant to Dr. Hirsch's assessment. As a result, Dr. Hirsch's consideration of prior medical history was limited to a review of Mr. Cook's medical records. In cross-examination, Dr. Hirsch said he could not recall if Mr. Cook stopped the interview to try and consult with his lawyer, but accepted that this may have happened. Dr. Hirsch further agreed that over the course of the interview, Mr. Cook became more cooperative and more willing to share information, particularly as regards the collisions and their effects.
- [101] In his physical examination, Dr. Hirsch noted that Mr. Cook presented with normal posture and pelvic alignment, and no apparent limitations on range of motion. Dr. Hirsch was cross-examined at length regarding the process he followed during the physical examination, and his ability to recall the details later, given that he made no notes or other records during the examination. Dr. Hirsch testified that his physical examination of Mr. Cook lasted some 20 minutes, during which he made anatomical observations and mental notes of any

abnormalities. He conceded that he did not use any devices nor take any specific measurements, repeating that he merely noted any abnormalities with the intention of referencing them in his report. Although he did not take any written notes during the examination itself, immediately after the exam he dictated the results, which were later transcribed into his report. Dr. Hirsch frankly admitted that he had no independent recollection of the examination at the time of his testimony, explaining that the results of the exam are as set out in his report.

[102] Dr. Hirsch did not observe any "pelvic upslip". In cross-examination, he expressed doubt about whether such a condition could be effectively treated manually. He explained that the sacroiliac is the strongest joint in the body, hence the suggestion that one could change a subject's hip position by manual therapy is "absurd". In any event it would inevitably move back into misalignment. Dr. Hirsch did say that what might look like a pelvic misalignment might actually be some other issue. A person could adjust posture as a result of pain, giving an appearance of pelvic misalignment. Dr. Hirsch agreed that the underlying pain could be addressed and reduced by manual therapy.

[103] In his report, Dr. Hirsch noted a "Waddell score" of 3/5, due to (i) a positive simulation test, (ii) a positive distraction test, and (iii) superficial tenderness. The 3/5 Waddell score was indicative of "exaggerated illness behaviour in individuals who present with low back pain". Dr. Hirsch was cross-examined extensively on his use of Waddell's tests. He maintained that he did not use the tests to determine whether Mr. Cook was being truthful, but only to determine whether there was an anatomical cause for the pain expressed by Mr. Cook. Dr. Hirsch's testimony revealed considerable familiarity with the technique and its utility, including authorship of several peer-reviewed articles on the topic. He explained that someone with a positive Waddell's test is exhibiting abnormal illness behaviour. Dr. Hirsch also accepted that Waddell's test has no real value in identifying myofascial pain, which may not have a clear anatomical source. Thus, Waddell's test cannot be used to determine whether a person actually has pain.

[104] I will summarize the substance of Dr. Hirsch's opinion evidence in six points.

[105] First, Dr. Hirsch conducted a review of Mr. Cook's WCB records, as a result of which he concluded that Mr. Cook had "recalcitrant upper extremity pains" dating back to a work-related incident in 1989, as a result of which he did not work for 12 years. After 2002, when all of Mr. Cook's WCB appeals had been denied, there was "no indication of any residual upper extremity symptoms" in Mr. Cook's medical records. Dr. Hirsch found this "very difficult to understand". Given the tangential relevance of Mr. Cook's history of ulnar nerve conditions to his present complaints, I consider this aspect of Dr. Hirsch's report to be an exercise in rhetoric that only served to detract from the objectivity of his evidence.

[106] Second, Dr. Hirsch offered a number of opinions with respect to Collision #1 and its effects. In particular:

- a) With regard to neck and shoulder symptoms, Dr. Hirsch's opinion was that as a "worst case scenario", Mr. Cook suffered "minor injuries to his neck and right shoulder region" in Collision #1. There was no indication that Mr. Cook sustained any more significant "structural damage" to his neck, such as a fracture, disc protrusion, or herniation. I do not consider this aspect of Dr. Hirsch's opinion to be helpful. It misses the point. The diagnoses offered by both Dr. Kagan and Dr. Shuckett was that Mr. Cook suffered soft tissue injuries to his neck and right shoulder. Dr. Hirsch's characterization of the injuries as minor based on the fact that there was no "structural damage" adds nothing and is of no assistance to me.
- b) With respect to Mr. Cook's leg pain:
- i. Dr. Hirsch noted the emergence of symptoms in November 2006, following Collision #1. However, Mr. Cook had prior complaints of sciatica in 2000, and prior complaints of right knee pain following a collision in 2003. In cross-examination, Dr. Hirsch agreed that prior issues of sciatica and right knee problems could contribute to the effect of subsequent injuries, including injuries from Collision #1 in 2006. I accept this aspect of Dr. Hirsch's opinion.
- ii. The onset of left knee pain did not occur until 2.5 years after Collision #1. In particular, an imaging scan revealed a complex medial meniscal tear for which Mr. Cook had successful arthroscopic surgery in 2009. Dr. Hirsch's opinion was that Mr. Cook's left knee impairment and resultant activity limitations were entirely unrelated to the 2006 collision. I accept this aspect of Dr. Hirsch's opinion, which is basically consistent with the conclusion I would draw from Dr. Shuckett's opinion on this point.
- iii. While tests subsequent to Collision #1 showed disc abnormality in the form of an L5S1 disc protrusion, in Dr. Hirsch's opinion this was incidental and not causally connected to Collision #1. This opinion differs somewhat from the opinion of Dr. Shuckett, who was unable to say one way or the other whether the disc herniation was causally connected to Collision #1. In my view, Dr. Shuckett's evidence was generally more balanced and objective than that of Dr. Hirsch, and I prefer it for that reason, although the difference between the two opinions is only very slight on this point.
- c) In cross-examination, Dr. Hirsch conceded that he could not rule out "chronic pain" from Collision #1, and agreed that if Mr. Cook did have chronic pain from this event, it would make him more susceptible to further injury in subsequent collisions. I accept, based principally on the opinion evidence of Dr. Shuckett, supported by the opinion evidence of Dr. Kagan, that Mr. Cook in fact suffered "chronic pain" from Collision #1.
- [107] Third, Dr. Hirsch offered an opinion with regard to Collisions #2, #3, and #4, namely that Mr. Cook "probably suffered injuries to neck and back", likely limited to soft tissue structures such as muscles, tendons, and ligaments. There was no indication of any "more significant structural damage" such as fracture, disc herniation or protrusion, or spinal instability. Dr. Hirsch opined that it would have been "reasonable" for Mr. Cook to suffer "a temporary period of partial social, vocational, and recreational limitation of four to eight

months" for Collision #2 in 2011, Collision #3 in 2015, and Collision #4 in 2016. I do not accept the latter aspect of Dr. Hirsch's opinion regarding collisions #2, #3, and #4. The question is not what duration of symptoms Dr. Hirsch considers to be "reasonable" based on some abstract notion of what one would normally expect, but what duration of symptoms Mr. Cook actually experienced.

- [108] Fourth, Dr. Hirsch provided an opinion regarding Mr. Cook's reports of "multisite axial skeletal pain". Dr. Hirsch's assessment revealed "superficial tenderness", along with a number of "inconsistencies" suggesting exaggerated pain behavior that may or may not be intentional. Based on all of this, a diagnosis of "myofascial pain disorder" could "neither be ascertained nor ruled out" by Dr. Hirsch. In cross-examination, Dr. Hirsch conceded that any such myofascial pain disorder could lead to chronic or permanent pain. Thus Dr. Hirsch could not rule out that Mr. Cook had suffered chronic pain in the wake of these collisions. Relying on the testimony of Dr. Kagan and the evidence of Mr. Cook himself and his treatment providers, I accept that Mr. Cook suffered chronic pain in the wake of collisions #2, #3, and #4.
- [109] Fifth, Dr. Hirsch's opinion with respect to future functionality was that Mr. Cook would not experience any limitations in his social, vocational, or recreational capacity as a result of the subject collisions. I do not accept this conclusion entirely. I find, based on the results of Mr. Lauder's functional capacity evaluation, the evidence of Mr. Cook himself, and the evidence of Mr. Cook's treatment providers, that Mr. Cook has experienced and will continue to experience minor limitations on his social and recreational activities. With respect to the impact on his vocational capacities, the evidence of Mr. Lauder is that Mr. Cook is only limited in his capacity to work in construction or other occupations involving heavy physical labour.
- [110] Sixth and finally, with regard to future treatment, Dr. Hirsch opined that Mr. Cook should continue with his "well established exercise program", but was not supportive of "passive treatments" such as physical modalities, massage, or chiropractic treatments. In cross-examination, Dr. Hirsch expressed the view that even if passive modalities such as massage and acupuncture relieve the patient's pain on a temporary basis, he would not support such techniques unless they actually progress the patient's condition. A patient who merely goes to physiotherapy every week, even if able to obtain temporary relief from pain, is not progressing and thus the treatment is of no long term benefit. Any relief is partial and temporary. In Dr. Hirsch's view, pain management is only relevant insofar as the pain interferes with function. Treatment should be time specific and goal oriented.

- [111] In re-examination, Dr. Hirsch maintained that nothing he said in cross-examination altered the opinion in his report that there is no further benefit to passive treatment modalities in Mr. Cook's case. Dr. Hirsch agreed that he is not himself an expert in physiotherapy, but explained that his role as a physician includes recommending, prescribing, and monitoring results of physiotherapy treatment for his patients. A patient obtains physiotherapy in accordance with his recommended course of medical treatment.
- [112] On this sixth point, the issue of future treatment, I accept Dr. Hirsch's opinion that the passive modalities of treatment Mr. Cook has been receiving are not likely to yield any long term improvement in his condition. This conclusion is entirely consistent with the evidence of Mr. Cook's treatment providers. As to whether treatment of this nature qualifies for an award of special damages or costs of future care, those are legal questions that will be addressed later in these reasons.

(2.16.5) Expert Opinion Evidence of Dr. O'Shaughnessy

- [113] Dr. O'Shaughnessy was tendered by the defendants as an expert in psychiatry. I found him to be qualified to give expert opinion evidence with respect to diagnosis, prognosis, medical management and rehabilitation of persons with psychiatric disorders. Dr. O'Shaughnessy was cross-examined at length regarding his qualifications, but in the end I was satisfied that he was amply qualified to present expert evidence in the subject matters described above. Dr. O'Shaughnessy was one of the founding members of the sub-specialty of forensic psychiatry in Canada. He was never required to write the certification exam, but that is because he was one of five doctors involved in developing the content of the certification exams in the first place. At the time that he gave his testimony, Dr. O'Shaughnessy had largely wound down his clinical practice, but his involvement in the field of forensic psychiatry has continued.
- [114] Dr. O'Shaughnessy met with Mr. Cook on 3 April 2019 for the purposes of an evaluation of his psychological condition. The interview took just under three hours. Dr. O'Shaughnessy subsequently conducted an analysis of available records. He made 37 pages of interview notes and a further 22 pages of notes summarizing relevant contents of Mr. Cook's records. Dr. O'Shaughnessy found Mr. Cook a difficult person to interview because he was initially uncooperative and not inclined to answer questions, although he became more open as the interview progressed.
- [115] Ultimately, Dr. O'Shaughnessy formed the opinion that Mr. Cook suffered from: (i) a delusional disorder, persecutory in nature, focused on the belief that there has been a conspiracy between ICBC, the Vancouver Police Department ("VPD"), and the Royal Canadian Mounted Police ("RCMP") to investigate and suppress him, and (ii) a major depressive disorder.
- [116] In Dr. O'Shaughnessy's opinion, Mr. Cook suffers from a delusional disorder with the following features:

- a) There are a number of facets to Mr. Cook's supposed delusion, all having to do with an alleged conspiracy between ICBC, VPD, and the RCMP.
- b) One facet of the conspiracy is focused on a belief that ICBC improperly shared Mr. Cook's cell phone number with the VPD. Mr. Cook was disputing a traffic ticket, obtained an order for disclosure, and then received an unsolicited phone call from the officer who issued the ticket. Mr. Cook believes ICBC must have shared his cell phone number with the officer.
- c) Another facet of the conspiracy is focused on the fact that Mr. Cook's common law partner Ms. Behrenz was initially accepted into the RCMP, then told one or two days later that her application was rejected. Mr. Cook believes Ms. Behrenz was not hired because of police suspicions about his connections to an outlaw motorcycle gang.
- d) A third facet is a belief that an ICBC investigator had been following Mr. Cook and engaged in various forms of inappropriate conduct including attempts to entrap him by proposing to sell him stolen liquor.
- e) Over time Mr. Cook became preoccupied with a belief that he was being persecuted. It "consumed him" for a number of years. He has stated on multiple occasions that he "lives, eats, and breathes" ICBC, or a variation of that phrase. He claims to have spent hundreds of thousands of dollars on legal fees. He has also spent as much as 12 to 14 hours per day pursuing freedom of information ("FOI") requests and writing letters, although he has subsequently reduced the amount of time spent on such matters.
- f) His fixation on FOI requests, investigations, and ICBC litigation has had a significant toll on his personal relationships, contributing to his break up with Ms. Behrenz, and causing him to lose contact with friends and family.

[117] Dr. O'Shaughnessy explained that delusional disorders are not caused by traumatic events. On this basis, Dr. O'Shaughnessy opined that Mr. Cook's delusional disorder was not caused by the collisions, although his delusional beliefs have impacted on his post-collision behaviour. Dr. O'Shaughnessy maintained this position on cross-examination.

[118] Importantly, Dr. O'Shaughnessy acknowledged in his report that his diagnosis of delusional disorder was based on the assumption that Mr. Cook's beliefs about a conspiracy against him are untrue. In this regard, during the assessment interview Mr. Cook claimed to have documents that would support his allegations. Dr. O'Shaughnessy said he would be prepared to alter his opinion if the documents were found to affirm Mr. Cook's claims.

[119] In cross-examination, Dr. O'Shaughnessy testified that a delusion is a fixed belief that is false and cannot be dispelled by reason. He further clarified that "rumination", which he described as a fixation or obsessive thought about a particular issue, does not amount to delusion. Dr. O'Shaughnessy's opinion is that Mr. Cook is fixated on a false belief or set of beliefs. Mr. Cook in effect suffers from paranoid delusions.

- [120] When asked how he determined Mr. Cook's beliefs to be false, Dr. O'Shaughnessy explained that in large measure it is a judgment call. In Mr. Cook's case, Dr. O'Shaughnessy concluded that Mr. Cook's beliefs were false based on a constellation of factors including his preoccupation with them, his over-reactive responses and behaviour when challenged about them, and the fact that the beliefs do not fit with common sense based on Dr. O'Shaughnessy's own life experience. Dr. O'Shaughnessy testified that when offered the opportunity to see documents to support Mr. Cook's beliefs, he declined because his understanding of the litigation process was that documents are supposed to go through lawyers. In the result, Mr. Cook offered to show the doctor a collection of documents that would support his beliefs, and the doctor never saw or reviewed them. Thus Dr. O'Shaughnessy's opinion that Mr. Cook's beliefs are entirely without foundation rests at least in part on an untested or unverified assumption that Mr. Cook has no independent or corroborating documentation.
- [121] Dr. O'Shaughnessy disagreed with the suggestion put to him in cross-examination that Mr. Cook's reaction to the collisions and ICBC's alleged failure to provide assistance may have been the driving force behind his preoccupation with perceived wrongs. In Dr. O'Shaughnessy's view, this explanation did not fit with the history of Mr. Cook's delusional condition, which goes back to 2005, prior to the first collision. The strength or intensity of Mr. Cook's delusional belief has since grown over time. Dr. O'Shaughnessy did agree with the proposition put to him by Mr. Cook's counsel that one reason people get upset with and potentially fixated upon agencies like ICBC and WCB is a perception that they are not receiving fair treatment, and that sometimes this perception can be accurate.
- [122] Dr. O'Shaughnessy repeated in cross-examination that there is a link between delusional disorder and depression. Sometimes depression itself can cause a delusional disorder, and sometimes a delusional disorder can cause depression. Dr. O'Shaughnessy's opinion was that in this case Mr. Cook's delusional disorder was the cause of his depression, because Mr. Cook's fixation on the delusion has drained his energy and dramatically affected his relationships and behavior.
- [123] Dr. O'Shaughnessy maintained on cross-examination that he was not able to opine on causation of the delusional disorder, but also noted that delusional disorders are not caused by physical trauma such as car accidents. Although Dr. O'Shaughnessy could not say when Mr. Cook's delusional condition began, he noted that the first incident cited by Mr. Cook (the traffic ticket incident) took place in 2005. Dr. O'Shaughnessy added that Mr. Cook's prior preoccupation with his WCB claim may have been delusional, but he could not say for sure.
- [124] Finally, I note that Dr. O'Shaughnessy was cross-examined at length with regard to the details of his conversation with Mr. Cook during the assessment interview. Among other things, counsel cross-examined Dr. O'Shaughnessy on precise words or phrases noted in his interview notes. I did not find this aspect of the cross-examination to be of any value in assessing the credibility, reliability, accuracy or weight of Dr. O'Shaughnessy's opinions. My

overall impression of the evidence on this point is that sometimes the words recorded in Dr. O'Shaughnessy's interview notes were words used by Mr. Cook, and sometimes they were the doctor's words or conclusions based on what Mr. Cook said. The notes do not purport to be a verbatim record of everything Mr. Cook said during the interview with Dr. O'Shaughnessy. In any event, I see no indication in the record that Dr. O'Shaughnessy's notes were materially inaccurate, or that they materially misstated what Mr. Cook said during the interview, even on Mr. Cook's own account of the interview as furnished in his trial testimony.

- [125] With all due respect to Dr. O'Shaughnessy's considerable experience in the field of forensic psychiatry, and his careful and professional analysis of this particular case, I cannot accept the central aspect of opinion, namely that Mr. Cook suffers from a delusional disorder. The crux of this disorder, as I understand it, is the subject's preoccupation with a fixed, false belief. Although Dr. O'Shaughnessy described Mr. Cook's alleged delusional belief system as a "conspiracy", that appears to be a term used to describe Mr. Cook's overall set of beliefs; I did not understand Mr. Cook to ever allege a grand conspiracy in which all of the perceived wrongs against him were part of a single overall objective or agreement between the various institutions involved. There is compelling evidence that Mr. Cook has what I would consider to be a disproportionate, unproductive, and even self-destructive preoccupation with a certain set of beliefs concerning the manner in which he has been treated by ICBC and various police agencies. However, I cannot accept on the evidence presented at this trial that the basic elements of Mr. Cook's belief are false.
- [126] For example, it may or may not be true that someone at ICBC shared certain information about Mr. Cook - i.e. a phone number - with the police. The information may well have been benign, the sharing of it may or may not have been impermissible, and Mr. Cook's preoccupation with this information sharing may be completely out of proportion to its significance. Nonetheless, I cannot conclude on the evidence adduced at this trial that the underlying belief itself is false. Hence, I cannot accept Dr. O'Shaughnessy's conclusion that Mr. Cook's belief is delusional. However disproportionate and unproductive Mr. Cook's reactions may be, I cannot say his underlying belief about ICBC's sharing of a piece of information with the police is false.
- [127] Similarly, it may or may not be true that Mr. Cook's former partner was originally told she would be hired by the RCMP, only to later be told that she would not be hired, based on some information the police learned about Mr. Cook's association with "unsavoury characters". As discussed in greater detail below, Mr. Cook himself harbours a suspicion that some of his former business clients were "unsavoury characters". It would not be surprising to learn that the police do security checks on applicants and close family members. Once again, I cannot conclude on the record before me that there is no kernel of truth to Mr. Cook's underlying belief about why the RCMP declined to hire his former partner. Hence I cannot conclude that Mr. Cook's belief about this matter is part of a delusional disorder.

[128] What remains of Dr. O'Shaughnessy's expert opinion is his diagnosis of major depressive disorder. Dr. O'Shaughnessy explained that during his assessment interview Mr. Cook admitted to experiencing feelings of low energy, diminished joy, loss of interest, and occasional or intermittent panic attacks. In terms of timing, Dr. O'Shaughnessy opined that the depression first emerged following Mr. Cook's breakup with Mr. Behrenz in 2017, and has since gotten worse to the point where Mr. Cook now has a major depressive disorder. With regard to treatment of this condition, Dr. O'Shaughnessy opined that Mr. Cook's depressive disorder has likely been brought about or "triggered" at least in part by his delusional beliefs. I do not accept that aspect of the opinion. Dr. O'Shaughnessy further opined that Mr. Cook's depression could be successfully treated with anti-depressants, an opinion which was not challenged by either party and which I accept.

(2.17) Conclusions as to Nature, Extent and Duration of Plaintiff's Injuries

[129] Considering all of the opinion evidence, together with the testimony of Mr. Cook himself, and the evidence of his treatment providers, my conclusions with respect to the nature, extent, and duration of Mr. Cook's injuries are as follows:

- a) In Collision #1, Mr. Cook's injuries consisted of (i) whiplash-type soft tissue injuries leading to myofascial pain with trigger points in his right neck and shoulder, (ii) soft tissue injury leading to low back pain and right-sided sciatica, and (iii) right knee pain. In respect of all these injuries, Mr. Cook had pre-existing complaints, the significance of which is addressed in the causation and damages portion of these reasons.
- b) Mr. Cook's left knee condition, attributable to a torn meniscus which did not become symptomatic until some two years after Collision #1, was incidental and unrelated to Collision #1.
- c) With respect to Mr. Cook's back pain, I am unable to make any factual finding as to the cause of the herniated disc. However, on the evidence presented in this trial I do not attach any significance to that particular condition beyond a mere label. At a practical level, the evidence satisfies me that Mr. Cook's neck, shoulder and back symptoms, and his left-sided sciatica, are all interrelated, with the most significant and enduring physical symptom being a postural problem manifesting itself as a misalignment of the pelvis (referred to by the witnesses as a "pelvic rotation" or a "pelvic upslip"). This condition first emerged during treatment by Ms. Martens in November 2006, several months after Collision #1.
- d) By June 2010, more than 3.5 years after Collision #1, Mr. Cook's symptoms were unresolved and he continued to suffer from chronic soft tissue pain in his neck, shoulder, and back, going into his legs.
- e) In Collisions #2, #3, and #4, Mr. Cook received soft tissue injuries further exacerbating the effects of Collision #1 and his unresolved pre-existing conditions.

- f) The most significant and lasting physical symptoms of Mr. Cook's injuries consist of chronic soft tissue pain, right-sided sciatica, and posture problems described in the evidence as a "pelvic rotation" or "pelvic upslip". There is, I find, compelling objective evidence from Mr. Cook's treatment providers of this pelvic upslip. I accept the opinion evidence of Dr. Hirsch that the pelvic upslip is likely not a function of any misalignment of Mr. Cook's sacroiliac joint itself, but is more likely a result of Mr. Cook adjusting his posture to accommodate for chronic pain, giving an outward appearance of pelvic misalignment. Passive physiotherapy techniques afford temporary relief, but the upslip generally returns in between treatment sessions.
- g) In terms of prognosis for Mr. Cook's physical injuries, I accept the opinion of Dr. Shuckett that by June of 2010 the symptoms from Collision #1 had become chronic. I find further based on the evidence of Dr. Kagan, Dr. Shuckett, and Mr. Cook's treatment providers that based upon Mr. Cook's soft tissue pain in the neck, shoulder, and back, right-sided sciatica, and pelvic upslip, he will "continue to experience ongoing sequelae with pain".
- h) In terms of treatment for Mr. Cook's physical injuries, I find, based on the evidence of Dr. Kagan, Mr. Lauder, and Mr. Cook's treatment providers that Mr. Cook's chronic pain and postural problems can be treated and managed by passive modalities of physiotherapy such as massage, active release, and dry needling. These treatments may assist by, among other things, adjusting or correcting Mr. Cook's posture, although the pelvic upslip is likely to return so long as Mr. Cook continues to experience chronic pain, which at this point is chronic. I further accept the evidence of Mr. Lauder that Mr. Cook can benefit from a self-directed exercise program.
- i) In terms of his psychological condition, I accept the opinion of Dr. O'Shaughnessy that at a certain point following the breakup with Ms. Behrenz in March 2017, Mr. Cook began to experience depression which later developed into a major depressive disorder characterized by feelings of low energy, diminished joy, and loss of interest. There is uncontested evidence that this condition is treatable with anti-depressant medication.

[130] Before setting out my conclusions regarding the effect of Mr. Cook's injuries on his activities and lifestyle, it is necessary to address the credibility of Mr. Cook's trial testimony.

(2.18) Credibility Issues

[131] Counsel for the defendants launched a vigorous attack on Mr. Cook's credibility. Given the centrality of Mr. Cook's testimony, it is impossible to decide the issues in this case without addressing this point. In this regard, I take guidance from the discussion of witness credibility in the leading case of *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), as well as the list of factors set out in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186-186, *aff'd* 2012 BCCA 296. Based on the specific points discussed below, I am left with serious concerns about the credibility of Mr. Cook's testimony.

- [132] To begin with, there is Mr. Cook's testimony about his WCB claims history. When it was suggested in cross-examination that Mr. Cook did not work at all between 1994 and 2003, he disagreed. He said he worked at some bars. However, official records do not reflect any CPP contributions from any employer over this time frame. Mr. Cook later admitted writing a letter dated 20 October 1997 stating that as of that date he continued to have a "severe and prolonged" work-related "disability", implying he was effectively unable to work from the date of his injury in 1989 up to at least 1997. There is also the matter of Mr. Cook's letter dated 26 July 2000, in which he wrote that his WCB appeal should be expedited because his situation was "desperate". When questioned about how this assertion aligned with his purchase of the Gore Avenue property using a down payment of some \$290,000 less than three years later, Mr. Cook responded that the term "desperate" was just a word he used in a letter. He added that his lawyer told him to use that term. When asked which lawyer, Mr. Cook gave several names and then said it was the lawyer who was "addicted to porn on his computer", a materially irrelevant assertion which suggests to me a spur of the moment attempt at character assassination by Mr. Cook as a reaction to being scrutinized about his own words in a letter he personally wrote. When pressed on whether he would say something to the WCB that was untrue just because someone told him to, Mr. Cook said he would not. He went on to say that when he used the phrase "severe and prolonged", it was just a "term" that his lawyers told him to use; they told him if he was off work for a long time, he needed to write that his condition was "severe and prolonged".
- [133] There is also Mr. Cook's lack of a plausible explanation concerning the source of the \$290,000 down payment to purchase the Gore Avenue property in January 2004. Mr. Cook's testimony on this point was remarkably vague. He said the money came from "gambling and other things that I did and I had". With regard to gambling, Mr. Cook said he was lucky and had a "series of multiple wins". He also said some of the money might have come from a job, "if I worked". He then referenced the settlement funds for his 2003 motor vehicle collision. He was later challenged on whether he had settled the claim for this collision by January of 2004, and expressed uncertainty about the timing. Later, he added that he might have received some "birthday money" from his grandmother. In the end, Mr. Cook "could not say one hundred percent" where the \$290,000 came from, and simply fell back on the assertion that the property purchase was effected with a bank draft and was therefore "not a cash deal". When asked again about the letter he had written in July 2000 stating that his financial situation was "desperate", Mr. Cook repeated that that was just a phrase the lawyers told him to use. With respect, I consider Mr. Cook's accounting for the source of these funds to be incredibly vague and evasive. I consider it very unlikely that a person pursuing a WCB claim with no stable income for a period of some 13 years would be unable to give more precise evidence as to the source of such a significant sum of money. The issue is not the actual source of the money. Rather, the issue is Mr. Cook's evasiveness and failure to give satisfactory answers in cross-examination, leading me to question his credibility.

- [134] In a somewhat related point, when asked where he got the money for his gambling endeavours, Mr. Cook responded, "I believe I worked [for it], but have nothing else to say". Again, this is remarkably vague evidence, especially when juxtaposed with Mr. Cook's testimony in chief in which he volunteered that sometimes he gambled \$2,000 to \$10,000 in single day.
- [135] I also have concerns about Mr. Cook's testimony as to his business, Edward's International. Mr. Cook volunteered that some of his clients were "unsavoury" characters. In cross-examination, he said this was his personal perception, not based on any specific knowledge of criminal activity on the part of his clients. When asked to name even one specific client of Edward's International, Mr. Cook testified that his clients would "remain anonymous" and would "pay in cash". I find this answer evasive and bizarre. The implication is that Mr. Cook could not name a single client because all of them were "anonymous" and paid in cash. Quite apart from whether that is good business practice, I find it highly implausible that one could carry on a personal security and counter-surveillance business without knowing the identity of one's clients. Similarly, when questioned about the t-shirt sales component of his business, Mr. Cook was unable to give any particulars as to "who he was working for", explaining that he would have to see invoices to give specifics. Again, I find it implausible that Mr. Cook could carry on a business involving at least \$60,000 per year in revenues for a number of years without being able to remember the name of a single supplier or client.
- [136] Next, there is Mr. Cook's testimony about his injury and subsequent hospital attendance on 1 July 2006. This point is significant in that Mr. Cook claims to have started working on the Gore Avenue construction project around this time, but he denies any work-related injury. The injury itself is significant because it preceded Collision #1 by a matter of mere months. However, Mr. Cook's testimony on this point is not credible. When referred to medical records about this incident, Mr. Cook said he had no recollection of what happened, explaining that it was some 13 years ago. Mr. Cook was referred to a 3 July 2006 note in Dr. Kagan's clinical records indicating that he had to go to the emergency room for neck pain on 1 July 2006. The note further indicated that Mr. Cook was "on the job site, shovelling gravel". Mr. Cook agreed with that part of the note, explaining that he started excavation on his project in June 2006. Yet Mr. Cook disagreed with counsel's suggestion that he hurt himself when shovelling gravel at the job site. He said if he was injured at the site, he would have made a WCB claim. I simply cannot accept Mr. Cook's testimony on this point. Dr. Kagan's contemporaneous record states that Mr. Cook hurt himself on the job site. Dr. Kagan would have no knowledge of the circumstances and no basis for including this in her clinical notes if it did not come from Mr. Cook. I find that this particular entry in Dr. Kagan's notes is an accurate account of the substance of what Mr. Cook said at the time, and that his refusal to acknowledge this in his testimony is one of a number of factors telling against his credibility.

- [137] I turn next to Mr. Cook's testimony about mental and emotional health issues arising from Collision #1. When asked at trial whether he had any such issues, he responded that he did, as pleaded in his notice of civil claim. Mr. Cook was then referred to his examination for discovery, in which he stated unequivocally that as of May 2009 he did not have any mental or emotional health issues arising from Collision #1. Mr. Cook agreed that he said this in the examination for discovery, but refused to accept that it was true. Mr. Cook could not explain why he would say he had no mental or emotional problems when he believes he did. This testimony is not credible. Rather than trying to give an honest account of the collision and its effects on his mental and emotional state, Mr. Cook clung to his litigation position, as demonstrated by his reference to the claims set out in his notice of civil claim in preference to his own deposition evidence.
- [138] Finally, there is Mr. Cook's conduct in surreptitiously recording medical assessments conducted by defence experts, and his subsequent trial testimony about this point. During his cross-examination Mr. Cook revealed, for the first time, that he made surreptitious recordings of the assessments conducted by Dr. Hirsch and Dr. O'Shaughnessy. Mr. Cook was aware that counsel for the defendants had applied for an order that he attend for one of these assessments. (The second assessment proceeded without a court order by agreement of counsel on the same terms as the first). Mr. Cook swore an affidavit in response to the defence application, in which he proposed certain terms including a term that he could be accompanied by a chaperone, and a term prohibiting the defendants from conducting surveillance. Mr. Cook was aware that the chaperone term was rejected by the court, and that the defendants conceded the no surveillance condition.
- [139] Knowing all this, Mr. Cook chose to make surreptitious audio recordings of the defence medical assessments. When questioned about his decision to do so, Mr. Cook explained that there was nothing in the order prohibiting him from making surreptitious recordings. The refusal of the chaperone condition did not bar him from recording the assessments, and the no surveillance term applied specifically to the defendants, not to the plaintiff. In a separate ruling, I held that these surreptitious recordings were made in contravention of the Supreme Court Civil Rules, B.C. Reg. 168/2009 such that the recordings themselves are inadmissible. Despite this conclusion, I cannot say that Mr. Cook's conduct in making the surreptitious audio recordings has any direct bearing on his credibility as a witness. While Mr. Cook was playing fast and loose with the court process and his conduct clearly crossed the line in this regard, I cannot say his decision to surreptitiously record the medical assessments is something that weighs against his credibility.
- [140] However, what does tell against Mr. Cook's credibility is the manner in which he chose to answer questions about this issue in cross-examination. This matter first arose when Mr. Cook volunteered that he had a "tape recording" of his meeting with Dr. O'Shaughnessy. He later testified that he similarly "tape recorded" his meeting with Dr. Hirsch. When asked directly whether he had given the "tapes" to his counsel, Mr. Cook responded that he had not done so. This prompted counsel for Mr. Cook to interject, pointing out that Mr. Cook in

fact digitally recorded the meetings with Dr. O'Shaughnessy and Dr. Hirsch and that he provided copies of those digital recordings to counsel. In answering in the negative in response to questions about whether he provided the "tapes" to his counsel, Mr. Cook was evidently relying on opposing counsel's question using the term "tapes" when the recordings were in fact "digital". While this is technically true, it is factually misleading. Even more so when one appreciates that in referencing the recordings earlier in his testimony, Mr. Cook initially described them in his own words as "tape recordings". Later in his testimony, Mr. Cook lapsed from time to time into using the term "tape recording", sometimes remembering to correct himself by then saying "digital recording". Given that Mr. Cook was not even capable of maintaining the distinction between "tape recordings" and "digital recordings" in his own mind, I consider it quite misleading for him to rely on that distinction to answer a direct question about whether he gave the "tapes" to his counsel in the negative, knowing that he had in fact given the "recordings" to his counsel. This is yet another factor that weighs against the credibility of Mr. Cook's trial testimony.

[141] Taking all of these points together and in consideration of the entirety of the admissible evidence, I am left with serious concerns about the credibility of Mr. Cook's testimony. As a result, I must approach his evidence carefully and with a measure of skepticism. Nevertheless, this does not compel me to reject all of Mr. Cook's trial testimony. As explained in *McKenzie v. Lloyd*, 2018 BCCA 289 at para. 35, the trier of fact may accept "all, some, or none" of the evidence of a particular witness. In Mr. Cook's case, I see no basis for concluding that he concocted facts in support of his claims, or gave a completely fabricated account of his circumstances. Rather, I see this as a case where Mr. Cook was inclined to mislead, and to overstate the extent of his injuries and their effects. I approach Mr. Cook's testimony about the nature, extent, duration, and effect of his injuries in that light.

(2.19) Effect of Collisions on Mr. Cook's Activities and Lifestyle

[142] The thrust of Mr. Cook's testimony in chief was that as a result of the collisions he has been limited physically, financially, and socially. I will address each of these subject matters in turn, mindful of the inevitable overlap between them.

(2.19.1) Activities of Daily Living

[143] Mr. Cook testified that he is limited physically in that he now experiences pain with certain basic activities of daily living such as getting dressed, tying his shoes, and driving. He also has pain with household activities such as vacuuming, making his bed, doing the laundry, washing his car, and shopping. He used to be able to fix his own cars but is no longer able to do so without experiencing pain. When the alternator on his truck went, he tried to remove it himself, but the exertion made him "immobile" for two or three days. Mr. Cook tries to go the gym regularly but is unable to do so if he is having a bad day or a bad week. Still, he finds that if he does not exercise, the pain gets worse. Mr. Cook's uncorroborated testimony on these points is not entirely consistent with the evidence of the functional capacity evaluator, Mr. Lauder, who opined that Mr. Cook is able to do basic housework but

is limited in his ability to complete heavier or more arduous tasks such as seasonal yard work and household maintenance and repair. I conclude that this is an instance where Mr. Cook has overstated the extent and effect of his injuries. Indeed, this conclusion is consistent with the observation of Mr. Lauder that during the functional capacity evaluation Mr. Cook reported somewhat higher levels of disability than those observed in testing.

(2.19.2) Sports and Recreation

[144] Mr. Cook testified that he is no longer able to participate in kickboxing and other martial arts, or enjoy golf the way he did prior to the collisions. I will address each of these in turn.

[145] With regard to martial arts, Mr. Cook testified that in the late 1990s he liked to go to kickboxing and Thai boxing classes four to five times per week, and he sparred with friends an additional one or two times per week. He also took conventional boxing lessons. Mr. Cook testified that prior to the collisions, he had no difficulties in these activities. However, Dr. Kagan agreed that in a medical appointment on 15 June 2004, Mr. Cook reported that he was unable to do kickboxing the way he had done prior to his 2003 collision.

[146] Mr. Cook also testified that prior to the collisions, he was an avid golfer, although he clearly never took it as seriously as lacrosse. He played one to two times per week, and he had a handicap of 4 to 6. Since the collision, Mr. Cook has not been able to golf as much and is not as good as he used to be. He has to take a cart because he cannot walk the course. Mr. Cook testified that he still tries to play at an annual "best ball" charity golf tournament every August. During the 2018 tournament, he had an emotional breakdown brought on by a collection of factors including his ongoing physical challenges, financial pressures, and stress from litigation. Mr. Cook took part in the 2019 tournament as well. He did not play well and his shots were "all over the place", but he wanted to show up so he could see his friends.

[147] Mr. Cook's testimony on this point was corroborated by the evidence of his long-time friends Mr. Johnson and Mr. Bruse. Mr. Johnson testified that between about 2005 and 2007 he went golfing with Mr. Cook about 10 to 12 times. He noted that Mr. Cook sometimes could not play the full 18 holes, complaining of back spasms. I accept, based on all the evidence I have just reviewed, that Mr. Cook's injuries have prevented him from enjoying the game of golf as much as he once did.

(2.19.3) Live Sporting Events

[148] Mr. Cook also gave evidence that he used to enjoy going to live sporting events like hockey or mixed martial arts competitions. He now finds such events less enjoyable, due to his inability to sit in stadium seating for extended periods of time. Mr. Cook described a number of specific occasions when he has had to leave live sporting events early or has been otherwise unable to enjoy them due to his inability to sit in stadium seating for prolonged periods.

- [149] Mr. Johnson testified that he and Mr. Cook used to go to hockey games together. Mr. Cook had season tickets for the Canucks, and they went to games together perhaps two to three times per year. In about 2012 or 2013, Mr. Johnson took over Mr. Cook's season tickets. Mr. Johnson testified that he went to a Canucks game with Mr. Cook one or two seasons ago and he noticed that Mr. Cook had difficulty sitting. Mr. Johnson and Mr. Cook also went to a UFC event in Montreal, where once again Mr. Cook had difficulty staying in his seat through the whole event, and had to get up and move around.
- [150] Mr. Bruse also noticed that Mr. Cook has difficulty sitting for long periods of time, as a result of which he is less inclined to go out to sporting events like hockey games. Mr. Bruse described an occasion several years ago when he and Mr. Cook went to a hockey game and Mr. Cook had to leave during the second period of the game because he was too uncomfortable in his seat.
- [151] I accept that Mr. Cook is limited in his ability to sit for prolonged periods of time and that this limitation has an effect on his enjoyment of live sporting events, with two important qualifications.
- [152] First, there is evidence that Mr. Cook had pre-existing conditions limiting his ability to sit for prolonged periods of time, prior to the four collisions in issue in this case. Recall the evidence that Mr. Cook had been involved in two prior motor vehicle accidents, in 1994 and 2003. There is also the testimony of Mr. Johnson that when Mr. Cook appeared to have difficulty sitting in once place for extended periods of time on gambling excursions and while accompanying Mr. Johnson on skip tracing work, in the early 2000s. Finally, recall the evidence of Dr. Kagan that from 2003 up to 2006, within one month of Collision #1, Mr. Cook consistently reported pain in, among other things, his neck and shoulder.
- [153] Second, despite Mr. Cook's testimony about difficulty sitting at sporting events for prolonged periods of time, he admitted that he now has season tickets for the Vancouver Canadians baseball team. Mr. Cook testified that he gave up his season tickets for the Canucks in about 2012 or 2013, principally because of the cost, some \$10,000 to \$12,000 per year for two tickets. He now purchases season tickets for the Canadians, at a cost of some \$3,000 for four tickets, for a total 39 home games. Mr. Cook admitted that he sits through the ball games, which are somewhat longer than hockey games, although he added that the seats at Nat Bailey stadium are more comfortable than the seats at Rogers Arena, and he gets up and stretches after every inning. Finally, Mr. Cook testified that sometimes he suffers after going to a Canadians game, although not every time. What I take from all of this is that while Mr. Cook may experience some discomfort and limitation associated with sitting for extended periods of time, he has developed strategies to cope with this limitation in order to continue to do leisure activities which he finds enjoyable and can afford.

(2.19.4) Parenting

[154] Mr. Cook testified that his injuries have placed limitations on some of the activities he does with his son, who is now 10 years old. Mr. Cook has not been able to play soccer or baseball with him. He cannot kick the soccer ball or move around cones due to back and leg pain, and he is unable to throw a baseball due to chronic pain in his neck and back. He is thus limited to giving Wyatt advice about techniques, without being able to demonstrate them or perform them. Mr. Cook also testified that he finds it difficult to attend Wyatt's soccer games, although he did not explain how his collision-related injuries impacted him in this regard. Another recent example of the manner in which his injuries have limited his activities with his son is Mr. Cook's inability go on rides at the PNE with Wyatt. Mr. Cook finds these limitations upsetting because they affect his relationship with his son. I accept Mr. Cook's evidence on this point, which is entirely consistent with the evidence of Mr. Lauder regarding Mr. Cook's function limitations.

(2.19.5) Financial Limitations

[155] Mr. Cook testified that he has unable to afford the kind of lifestyle that he lived prior to the collisions. He testified that prior to the four collisions he lived an extravagant lifestyle. Although he was not precise about the time frame, it seems that the period Mr. Cook was referring to in this regard would have been from the early 2000s up to and beyond the middle of 2006. Mr. Cook testified that during this time frame, he spent lavishly on gifts and entertainment for himself and Ms. Behrenz. He liked to buy expensive clothing and jewelry for Ms. Behrenz. Mr. Cook also funded trips for himself and Ms. Behrenz to places like Europe, Cuba, Dominica, Mexico, and Las Vegas.

[156] Mr. Cook also frequented expensive restaurants where he and his dinner companions would spend thousands of dollars. Sometimes Mr. Cook would play games of chance or skill with his companions to determine who would pay the cheque. Mr. Cook's testimony on this point was corroborated by the evidence of his friends Mr. Johnson and Mr. Bruse, both of whom described the extravagant meals they had with Mr. Cook over the years.

[157] Mr. Cook testified that he has not been able to maintain the same lifestyle after the collision. He and Ms. Behrenz stopped going out for expensive dinners, and he has been unable to purchase any expensive gifts for her. The two of them have only gone on one trip, to Palm Springs in 2015 and 2016, a trip which Mr. Cook funded by pawning his wedding ring. When Mr. Cook goes out to dinner with his friends Mr. Bruse or Mr. Johnson, he is not able to pay the bill. Mr. Johnson confirmed that some time in the late 2000s, his dinners with Mr. Cook became "less opulent", principally because Mr. Cook could not afford them. They no longer compete for the cheque and Mr. Johnson generally has to pay.

[158] Mr. Cook also says he used to enjoy gambling. Prior to the collisions, he liked to gamble with Mr. Johnson at casinos in Vancouver and Las Vegas. Mr. Cook testified that they would gamble for as long as 10 to 12 hours at a time, turning over \$2,000 to \$10,000 in a single sitting, on games such as roulette, poker, blackjack, and Pai Gao. Since the collisions, Mr. Cook is no longer able to enjoy gambling for several reasons. For one thing, he does not

have the money. He testified that he went gambling with Mr. Johnson once in the last year, and Mr. Johnson had to lend him \$500. For another thing, Mr. Cook says that due to chronic pain he is simply unable to sit in one position long enough to gamble the way he once did.

[159] Mr. Cook's evidence about his gambling pursuits was corroborated to a large extent by Mr. Johnson, who testified about some his casino excursions with Mr. Cook in Vancouver and in Las Vegas. In Las Vegas, they would gamble for two or three days in a row, although Mr. Cook was somewhat limited by his inability to sit for extended periods of time. (It should be noted that Mr. Johnson also observed Mr. Cook to have some difficulty sitting for extended period times as far back as 2001, when Mr. Cook helped him with "skip tracing" work.) Mr. Johnson further testified that Mr. Cook no longer has the means to go on such gambling excursions.

[160] Even accepting all of the evidence presented by Mr. Cook about his change in financial means over time, there remains an open question about the extent to which any of this is attributable to the collisions. I note that Mr. Cook's claim includes a claim for loss of income and loss of income-earning capacity. I heard a great deal of evidence from Mr. Cook about his financial situation, his lost opportunities, and his disposal of various assets, including a luxury condominium and a considerable quantity of precious metals, to fund his lifestyle. The extent to which Mr. Cook's financial woes were a function of any loss of earning capacity was a hotly contested issue and counsel for the defendants vigorously challenged Mr. Cook's testimony on both his work capacity and his financial situation. I will deal with the work capacity issue below. At this point, it is enough to say that any diminishment in enjoyment of life based on a decline in financial means would only be attributable to the collisions if Mr. Cook satisfies the court that his collision-related injuries resulted in an actual loss of income or income earning capacity.

(2.19.6) Social Limitations

[161] Mr. Cook also gave evidence that over time he has become increasingly socially isolated, less outgoing, and less pleasant to be around. More specifically, Mr. Cook testified that:

- a) He broke up with Ms. Behrenz in 2017. Mr. Cook attributed the breakup to a variety of things, including his inability to participate in the kinds of activities they used to do together, and his admitted pre-occupation with his ICBC litigation.
- b) He has since started dating again, but he finds it difficult to socialize. He is unable to do all the things he used to do and does not want to be a burden on others. His physical limitations have also affected his sex life.
- c) He took a trip to Mexico with a girlfriend in 2018. He found the plane flight difficult, was unable to swim in the ocean, and unable to walk as far as he had done on earlier vacations.

- d) He still has regular lunches and dinners with friends like Mr. Johnson and Mr. Bruse, but finds such events less enjoyable than he used to because he has little money and is prone to complain about his injuries and his litigation.
- [162] Mr. Bruse and Mr. Johnson both gave evidence about Mr. Cook's increasing social isolation. Mr. Bruse testified that Mr. Cook has become notably less social over the past 10 years. He no longer has money to pay for expensive dinners. He often seems depressed and preoccupied with his ICBC case. Mr. Bruse testified that Mr. Cook drinks more than he used to, and he has personally seen Mr. Cook "break down emotionally" several times. Mr. Johnson testified that he has seen Mr. Cook's personality change over time. Since about 2008, Mr. Cook has been more emotional and less jovial. In cross-examination, Mr. Johnson agreed that the most notable changes in Mr. Cook's personality occurred after the break up of his relationship with Ms. Behrenz.
- [163] I accept, based on the testimony of Mr. Cook, Mr. Johnson, and Mr. Bruse, that Mr. Cook has become more and more socially isolated over the past number of years. Indeed, counsel for the defendants accepts this to be the case. The key point of dispute between the parties is the cause or source of Mr. Cook's increasing social isolation. On the one hand, Mr. Cook says it is attributable in large part to his injuries and their affect on his demeanor and attitude. On the other hand, the defendants say Mr. Cook has isolated himself due largely to his own behavior, more specifically his obsession with ICBC. By Mr. Cook's own account, there have been periods when he lives, eats, and breathes ICBC, or words to that effect. He claims to have spent hundreds of thousands of dollars and up to 60 hours per week pursuing his grievances with ICBC and other such institutions. This unhealthy fixation, the defendants say, has caused Mr. Cook to drive away most of his friends. I will deal with this issue below under the heading of causation.
- (3) Liability
- [164] The defendants Mr. Kang, Ms. Le, and Ms. Dempster admitted liability for Collisions #1, #3, and #4 respectively. What remains in issue between the parties is liability in respect of Collision #2. To be more specific, the issue insofar as Collision #2 is concerned does not have to do with responsibility for the collision itself, but rather whether Mr. Cook is entitled to judgment against the defendant ICBC.
- [165] I have no difficulty concluding that Collision #2 occurred as a result of the negligence of the unidentified driver of the compact car that entered the intersection on a red light and collided with Mr. Cook's truck. However, it is argued that Mr. Cook is not entitled to judgment against ICBC as a nominal defendant because he failed to take all reasonable steps to ascertain the identity of the other vehicle's owner and driver as required under s. 24(5) of the IVA.
- [166] Not knowing the identity of the owner or driver of the other vehicle involved in Collision #2, Mr. Cook named ICBC as a defendant under s. 24(1). That provision allows for an action against ICBC as a "nominal defendant" by a person claiming to have suffered injury or

damage as a result of the operation of a vehicle on a highway in British Columbia in circumstances where the names of the owner and driver of the vehicle responsible are not "ascertainable". However, s. 24(5) limits the right to bring an action against ICBC as a nominal defendant, by providing that "judgment against [ICBC] must not be given" unless the court is satisfied that "all reasonable efforts have been made" to ascertain the identity of the unknown owner and driver.

[167] The relevant facts in this case can be summarized as follows:

- a) Mr. Cook was involved in a collision with another vehicle in a relatively busy intersection. Both Mr. Cook's truck and the other vehicle involved in the collision, a red compact car, came to rest in the middle of the intersection, about 15 to 20 feet apart, separated by a lane of traffic.
- b) The movement of traffic resumed shortly after the collision, preventing Mr. Cook from safely crossing the street to have a face to face conversation with the occupants of the red car.
- c) Mr. Cook backed his truck up, got out, and went to speak with the driver behind him, to find out if she saw what happened. He had access to a pen, and wrote down the name and phone number of the potential witness.
- d) The collision had no immediate impact on Mr. Cook's physical or mental capacity, as evidenced by the fact that he had the wherewithal to speak with and write down contact information for the driver of another vehicle at the scene, intending to rely on that person as a witness in subsequent litigation.
- e) The occupants of the red car did not immediately flee the scene. Indeed, the evidence shows that they remained at the scene for some appreciable period of time, on the opposite side of the road. The red car was still in its position on the other side of the intersection when Mr. Cook was speaking with the prospective witness.
- f) Mr. Cook testified, and I accept, that he was unable to see the license plate of the red car from his position. Mr. Cook further testified, and I accept, that he was not able to safely reposition himself so that he could see the license plate, given that traffic had already resumed through the intersection.
- g) Mr. Cook got into his truck with the intention of re-positioning it to, in his words, "clear the intersection", believing it unsafe or imprudent to leave his truck in the intersection indefinitely.
- h) Mr. Cook drove his car up the street, turned the corner, and stopped in the parking lot of a restaurant about half a block away, intending to meet there with the driver of the other vehicle involved in the collision, the red car.

- i) There is no evidence that Mr. Cook signalled or made any effort to communicate his intention to "reposition" his truck before he drove it away from the scene of the collision.
- j) The red car left the area, driving up Taylor Way.
- k) Mr. Cook immediately phoned 911 and made a report that the other party involved in the collision had driven away. The police responded and Mr. Cook spoke with them.
- l) Mr. Cook later made arrangements through his counsel to post signs in the vicinity of the collision, seeking witnesses who might be able to assist in ascertaining the identity of the driver and owner of the other vehicle.

[168] The question to be determined is whether, on these facts, Mr. Cook can be said to have made "all reasonable efforts" to ascertain the identity of the driver and owner of the other vehicle as contemplated in s. 24(5) of the IVA.

[169] The leading case regarding the interpretation and application of what is now s. 24(5) of the IVA is *Leggett v. Insurance Corporation of British Columbia* (1992), 72 B.C.L.R. (2d) 201 (C.A.) [Leggett]. In that case the plaintiff, believing he suffered no appreciable injury, left the collision scene without exchanging identification or vehicle registration information with the other party involved. The plaintiff later realized that he suffered an injury and brought an action against ICBC as nominal defendant. The Court of Appeal set aside the trial judgment that had been granted in the plaintiff's favour on the basis that he failed to take reasonable steps to ascertain the other party's identity. In doing so, Taylor J.A. explained at para. 9 that "the overall purpose of the section is to limit the exposure of the corporation to claims brought by persons who, in the matter of seeking to identify the responsible for the accident, have done everything they reasonably could to protect what ordinarily would be their own interests, and which, by virtue of the section, become the interests of the corporation".

[170] The defendant also relies upon *Burley v. ICBC*, 2003 BCSC 1837 [Burley], in which a pedestrian plaintiff was hit by a van in a cross-walk. The van stopped and an occupant asked if the plaintiff was alright. The plaintiff did not respond, but rather continued walking to the sidewalk in order to get off the street. The van then drove off. The plaintiff went about her business but as the day went on began to suffer the effects of the collision. She ended up in the hospital. The collision was not reported to ICBC until the next day, and was not reported to the police until one week later.

[171] The court in *Burley* started its analysis at para. 7 with the proposition that the plaintiff bore the burden of establishing that she had taken reasonable steps to identify the driver as contemplated in *Leggett*. The court accepted at para. 19 that it was reasonable for the plaintiff to assume the driver of the van would abide by the legal obligation to remain at the scene and it would accordingly be unreasonable to expect the plaintiff to chase down the van to identify the driver. However, the plaintiff was in a position to request the necessary information when the van stopped in front of her and the occupant enquired about whether

she was alright.

- [172] In the end, the court in *Burley* appeared to base its conclusion that the plaintiff failed to meet her burden on two separate footings. First, the court held at para. 24 that where the plaintiff fails to take reasonable steps to ascertain the driver's identity on the belief that she suffered no injury and thus had no intent to bring an action, her claim must fail. Second, the court held "most importantly" at para. 26 that the plaintiff's failure to immediately contact the police was fatal to her position, reasoning that if she had done so, there was a "realistic possibility" of locating the van despite the failure to ascertain the license plate at the collision scene.
- [173] Counsel for Mr. Cook relies on *Nicholls v. Insurance Corporation of British Columbia*, 2011 BCCA 422. The plaintiff in that case was a motorcyclist who slipped on a patch of spilled diesel. His efforts to identify the vehicle and driver responsible for the spill were limited to his father flagging down a truck owned by the defendant highway maintenance company, and then having a discussion with the driver of that truck about sanding the spilled area. In holding that the plaintiff had met his burden under s. 24(5), the trial judge reasoned that the test was not one of perfection, and in applying it the court must take into account the plaintiff's "subjective circumstances", "including the severity of his injuries". With respect to the plaintiff's lack of post-event efforts, the court applied a sort of cost-benefit analysis to conclude that in light of the crash location it would not have been reasonable for the plaintiff to have posted signs seeking to identify witnesses: *Nicholls v. Emil Anderson Maintenance Co. Ltd.*, 2010 BCSC 1640 at para. 6, 9.
- [174] The Court of Appeal upheld the trial judge's decision. D. Smith J.A. explained at para. 26 that "what constitutes 'all reasonable efforts' is a question of fact to be determined on all the circumstances". In reviewing the case law, Her Ladyship concluded at para. 31 that "the only qualification on the requirement of 'all reasonable efforts' in s. 24(5) is the subjective aspect of the test that requires the 'position and condition' of the plaintiff to be considered in determining what efforts are reasonable in the circumstances".
- [175] Mr. Cook's counsel also cited *Ghuman v. ICBC*, 2019 BCSC 3 [Ghuman]. In that case the plaintiff was driving in a residential area in Surrey when he was struck by another vehicle which then fled the scene. The plaintiff got out of his car within ten seconds of the collision but by that time the other vehicle had sped away. The plaintiff only noted a very general description of the vehicle and the trial judge accepted that he was unable to memorize or record the license plate number before the other vehicle sped away. It was dark outside at the time of the collision, and by the time the plaintiff exited his car there were no other vehicles or obvious witnesses in the area. The plaintiff reported the hit and run to the police and to ICBC the following day. Within about one week of the collision, the plaintiff posted flyers around the scene, and within a month or so his counsel arranged for more signs seeking witnesses to be posted in the area, with no success.

- [176] In holding that the plaintiff had met his burden to take "all reasonable steps" under s. 24(5), Donegan J. reasoned that it was necessary to consider two time frames. The first focuses on the steps taken at the scene in the immediate aftermath of the collision, and the second focuses on the steps taken in the days and weeks following the collision. Donegan J. held at para. 52 that the plaintiff made "all reasonable efforts" in both timeframes.
- [177] I also consider the following review of relevant legal principles set out in *Rieveley v. Doe*, 2017 BCSC 202 [Rieveley] at para. 21-26, cited with approval in *Ghuman*, to be particularly instructive:
- [21] The test I must apply is whether the plaintiff has taken steps to identify the unknown owners or drivers "as resolutely and resourcefully as [he or she] would have done" in circumstances where claiming against ICBC as a nominal defendant was not an option (*Leggett*, para. 13, internal references omitted).
- [22] To meet the criteria for "all reasonable efforts" under s. 24(5) a plaintiff must act as if the statutory provision is not in existence. In other words, upon sustaining damages from a collision caused by an unidentified owner or driver, a plaintiff cannot look to s. 24 of the Act as the remedial avenue of choice, down tools, assume that ICBC will be available as a nominal defendant, and then, relying on this same assumption, decline to embark on inquiries that he or she would otherwise be reasonably expected to make.
- [23] On the contrary, plaintiffs bear a positive obligation at the collision scene, and in the days and weeks following the collision, to take all necessary and reasonable steps to establish the identity of the offending owner and/or driver (*Morris v. Doe*, 2011 BCSC 253, at paras. 45-54). This is so even if their efforts do not prove fruitful.
- [24] A plaintiff does not bear an "exceptionally onerous" obligation under s. 24(5), particularly where there is no suggestion of fraud on his or her part. However, it is an onus that is not "easily displaced", even where the unidentified owner or driver has fled the scene (*Morris* at para. 47, internal references omitted). See also *Goncalves v. Doe*, 2010 BCSC 1241, at paras. 5-11; *Johal v. Insurance Corporation of British Columbia and John Doe*, [1992] B.C.J. No. 1169 (S.C.), at p. 5.
- [25] Whether "all reasonable efforts" have been shown requires a case-by-case assessment, as informed by the unique circumstances of the facts surrounding the collision and the plaintiff's conduct in the days, weeks and perhaps months following.
- [26] "The standard to be met is reasonableness. Whether the conduct falls on one side of the line or the other is a question of fact for the trier of fact": *Holloway v. ICBC and Richmond Cab and John Doe*, 2007 BCCA 175, at para. 12. See also *Nicholls v. Insurance Corporation of British Columbia*, 2011 BCCA 422. There, at para. 26, it was reiterated that the assessment of whether "all reasonable efforts" have been made is a "question of fact to be determined on the circumstances of each case" (internal references omitted).

- [178] In the case at bar, there is no concern about fraud on Mr. Cook's part. At the time of these events, Mr. Cook would have had no reason not to ascertain the identity of the other motorist involved, and I am satisfied that in his testimony he accurately described the circumstances in which he says he was unable to do so. Indeed, Mr. Cook contacted the police more or less immediately after determining that the other party departed the scene. Thus, I accept that Mr. Cook was acting honestly and was genuinely interested in ascertaining the identity of the driver and owner of the other vehicle. Still, that is not the end of the analysis. The question is whether he complied with his obligation to take all reasonable steps to identify the others involved. Accepting that Mr. Cook acted honestly, what remains to be determined is whether he acted reasonably.
- [179] Following the approach in *Ghuman*, I find it helpful to break the analysis into two different stages, namely (i) at the collision scene, and (ii) in the "days and weeks" following the collision. To borrow a phrase from the *Rieveley* decision, Mr. Cook had a "positive obligation at the collision scene, and in the days and weeks following the collision, to take all necessary and reasonable steps" to ascertain the identity of the others involved.
- [180] In considering the steps taken by Mr. Cook at the collision scene, it is important to take into account his subjective "position and condition". The evidence satisfies me that Mr. Cook was not suffering under any physical or mental impairment at the collision scene. He was clearly in possession of his faculties and cognizant of his circumstances, as evidenced by his efforts to gather information from a potential witness almost immediately after the collision. Nevertheless, I accept that by virtue of his physical position on the road, in an intersection separated from the other vehicle involved in the collision by a lane of moving traffic, he was not able to immediately approach and exchange particulars with the other party. I further accept that even though Mr. Cook had a pen in his hand, he was not able to safely observe and note the license plate of the other vehicle from his position at the collision scene.
- [181] The more challenging aspect of this case is Mr. Cook's decision to leave the immediate location of the collision, to "reposition" his truck, before exchanging information with the occupants of the other vehicle. Mr. Cook says he had a legal obligation to "clear the intersection". In support of that position, he cites s. 187 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA]. Under s. 187(1), a person is not permitted to stop, park, or leave a vehicle either attended or unattended "on the roadway" if it is "practicable" to stop, park, or leave the vehicle off the roadway. Under s. 187(2), a person must not "park a vehicle so as to obstruct the free passage of traffic". Both of these provisions are subject to s. 187(3), which states that ss. (1) and (2) do not apply "when a vehicle is so disabled that it is not practicable" to avoid stopping or temporarily leaving it on the road.
- [182] It is noteworthy that s. 187 of the MVA does not establish an absolute prohibition against parking or stopping a vehicle in a roadway, in that it is subject to a requirement of practicability. It is also important to interpret the obligations in s. 187 together with all the other provisions of the MVA. Most relevant in the present context is s. 68(1) of the MVA,

which sets out the duties of a driver involved in an accident. Under this section, any "driver" or "other person in charge of" a vehicle involved in an accident on the highway is obliged to, among other things, "remain at or immediately return to the scene of the accident" (per s. 68(1)(a)), and "produce to any other driver involved in the accident" written verification of his or her name, address, and vehicle registration information (per s. 68(1)(b)). Thus, Mr. Cook and the other person involved in the collision were each subject to at least two separate sets of obligations under the MVA. First and foremost, they were each obliged to remain at the scene of the collision for the purpose of, among other things, exchanging information with each other (per s. 68(1)). Secondly, they were each obliged to clear the intersection when it was practicable to do so (per s. 87).

- [183] I accept the proposition advanced by Mr. Cook that in some instances, where it is practicable and safe to do so, it is reasonable and indeed legally obligated for motorists involved in a collision to remove their vehicles from the roadway to allow for the "free passage of traffic" as contemplated in s. 187 of the MVA. However, that obligation can only be said to arise at the point in time where the motorists involved in the collision have taken reasonable steps to meet their mutual obligations to remain at the scene to allow for the exchange of identity and registration information as contemplated in s. 68(1) of the MVA. In some instances, the parties might discharge this obligation by communicating and mutually agreeing to reposition their vehicles to a safe location, to clear the roadway.
- [184] In the case at bar, Mr. Cook left the collision scene before exchanging information with the driver of the other vehicle involved. I accept that Mr. Cook did so with the intention of "clearing the intersection" so as not to impede traffic. I also appreciate that Mr. Cook did not depart the area entirely, but merely "repositioned" his truck a short distance away from the collision scene. However, the fact remains that Mr. Cook left the scene without any apparent effort to communicate his intention to the other party.
- [185] Mr. Cook was not the victim of a conventional "hit and run", where the other driver involved in the collision fled the scene before Mr. Cook could determine his or her identity. I find as a fact that Mr. Cook drove away from the immediate scene of the collision before the other motorist. In doing so, without any effort to communicate his intention to "reposition" his truck, Mr. Cook may well have caused the other driver to believe that Mr. Cook himself did not intend to comply with his obligation to remain at the scene as required under s. 68 of the MVA.
- [186] The burden is on Mr. Cook to establish on a balance of probabilities that he took "all reasonable steps" to ascertain the identity of the driver and owner of the other vehicle involved in the collision. The standard is not one of perfection, but rather, what is reasonable in all the circumstances. I conclude that in removing his truck from the collision scene without making any apparent effort to communicate his intentions with the other party involved, Mr. Cook failed to meet that standard. Although Mr. Cook did not act dishonestly, he acted imprudently. Section 24(5) imposes an obligation on a person seeking to advance a claim against ICBC to act reasonably in his or her efforts to ascertain the

identity of the other parties involved, and in this case Mr. Cook failed to do so.

[187] For the sake of completeness, I will move on to consider the second time frame in the analysis, that is, the "days and weeks following the collision" as contemplated in Ghuman and Rieveley. I am satisfied that in the particular circumstances of this case, Mr. Cook took all reasonable steps that could be expected of him in the days and weeks after the collision to ascertain the identity of the other party involved. Having reported the incident to the police more or less immediately, Mr. Cook later arranged through his counsel for the posting of signs near the scene of the accident in an effort to locate witnesses who could assist in identifying the driver and owner of the other vehicle involved in the collision. He was not challenged on this point, and I accept that nothing more could reasonably have been expected of Mr. Cook to ascertain the other party's identity in the "days and weeks" after the event.

[188] My conclusions on the question of liability are as follows. First, Mr. Cook has established the liability of the defendants in respect of collisions #1, #3, and #4. Second, by virtue of Mr. Cook's failure to discharge the burden imposed on him under s. 24(5) of the IVA, the court cannot grant judgment against the defendant ICBC in connection with Collision #2.

(4) Legal Principles of Causation and Assessment of Damages

[189] There are in my view six points of law that serve to define the parameters of the legal analysis in this case, the first of which is the basic test for causation. To establish causation, the plaintiff must demonstrate on a balance of probabilities that "but for" the tortious conduct of each defendant, the injuries suffered by the plaintiff would not have occurred: *Athey v. Leonati*, [1996] 3 S.C.R. 458 [Athey] at para. 14; *Resurfice Corp. v. Hanke*, 2007 SCC 7 at para. 21, 29; *Clements v. Clements*, 2012 SCC 32 at para. 8.

[190] The second point of law has to do with situations where there are multiple or competing causes at play. The law provides that where there are said to be causes for the plaintiff's injury other than the conduct of the defendants, including pre-existing conditions, the requirement for causation is made out where it is shown that the tortious conduct was a contributing cause to the plaintiff's injury. Thus although the "but for" analysis continues to apply in the sense that the plaintiff must show that he or she would not have suffered the injury "but for" the defendant's tortious conduct, the test can be met by proof that the defendant's tortious conduct was "a contributing cause" to the plaintiff's injury: *Athey* at paras. 12, 17. To sum it up in one phrase, "a defendant is liable for any injuries caused or contributed to by his or her negligence": *Athey* at para. 12.

- [191] This leads to a third point, which has to do with pre-existing conditions. The law of causation provides that where the defendant's conduct is found to be a contributing cause of an injury, the defendant is liable and that liability is not reduced or apportioned due to the presence of other contributing causes. Thus, the defendant tortfeasor is liable for the plaintiff's injuries even if those injuries are unexpectedly severe due to a pre-existing condition: *Athey* at para. 34.
- [192] The fourth point has to do with the legal distinction between causation and damages as discussed in *Blackwater v. Plint*, 2005 SCC 58 at para. 78. On the one hand, for the purpose of the causation analysis the tortfeasor must take the victim as is, such that the tortfeasor is liable for all of the plaintiff's injuries even if they are unexpectedly severe due to a pre-existing condition: *Athey* at para. 34. On the other hand, when it comes to assessment of damages the law requires the tortfeasor to restore the victim to his or her original position, but no better position. Thus in assessing damages, it is the difference between the victim's "original position" prior to the tortious conduct, including any pre-existing conditions, and the victim's "injured position" after the tort that is used to measure the loss: *Athey* at para. 32.
- [193] A fifth point of law at play in this case is the manner in which "independent intervening events" are treated in the assessment of damages. The overarching objective of tort law is to place the victim in the position that he or she would have been in absent the defendant's tortious conduct: *Athey* at para. 32. Where the victim's position is altered by some intervening event that would have occurred independent of the defendant's tortious conduct, it is necessary to account for the effect of that event on the victim's position in assessing damages for the defendant's tortious conduct.
- [194] A sixth and final legal point at play in this case is the distinction between divisible and non-divisible injuries. In a case involving multiple tortfeasors, there may be debate as to which defendant is liable to compensate the victim for which injuries. On this point, the law holds that where the plaintiff suffers "separate and distinct" injuries from the tortious acts of two different defendants, then each defendant is liable only for the injury he or she caused: *Athey* at para. 24. By contrast, where the plaintiff's injuries are "indivisible", then each defendant found to have negligently caused or contributed to the plaintiff's injuries will be liable for those injuries: *Athey* at para. 25.

(4.1) Conclusions on Causation, Divisibility, and Intervening Events

- [195] My conclusions with regard to causation, divisibility, and intervening events in respect of Mr. Cook's injuries are as follows:
- a) The defendants Mr. Kang, Ms. Le, and Ms. Dempster are legally responsible in negligence for collisions #1, #3, and #4 respectively and are each liable for Mr. Cook's damages in respect of all injuries for which their conduct was a contributing cause.

- b) Prior to Collision #1, Mr. Cook had unresolved myofascial pain in his neck, shoulder, and back, and unresolved pain in his right knee.
- c) In respect of Collision #1, Mr. Cook sustained (i) whiplash-type soft tissue injuries leading to myofascial pain with trigger points in his right neck and shoulder, (ii) soft tissue injury leading to back pain and right sided sciatica, and (iii) right knee pain. All of these injuries had the effect of aggravating Mr. Cook's pre-existing symptoms discussed in the preceding subparagraph.
- d) Mr. Cook's left knee condition, attributable to a torn meniscus that did not become symptomatic until more than two years after Collision #1, was not caused by Collision #1. For the purposes of the damages assessment, this is to be considered an independent intervening event.
- e) With regard to Collision #2, Mr. Cook is not entitled to judgment against the defendant ICBC by virtue of a failure to meet his burden under s. 24(5) of the IVA. For the purposes of the damages assessment, Collision #2 is therefore also characterized as an independent intervening event.
- f) In respect of collisions #3 and #4, Mr. Cook sustained further whiplash-type soft tissue injuries aggravating the unresolved symptoms from Collision #1 in relation to his neck, shoulder, back and right knee.
- g) The injuries sustained by Mr. Cook in Collisions #1, #3, and #4 are indivisible. Accordingly, all three defendants, Mr. Kang, Ms. Le, and Ms. Dempster are jointly and severally liable for Mr. Cook's damages arising from the injuries sustained in these collisions.
- h) Mr. Cook's neck, right shoulder, and back symptoms, and his right-sided sciatica are all interrelated. The associated chronic myofascial pain caused Mr. Cook to adjust his posture, producing a "pelvic rotation" or "pelvic upslip". This pelvic upslip first emerged in November 2006 and was, I find, caused by the injuries sustained in Collision #1. The severity of the pelvic upslip and its effects have been aggravated by the injuries Mr. Cook sustained in collisions #3 and #4.
- i) The pelvic upslip was not a pre-existing condition. However, Mr. Cook's unresolved soft tissue injuries preceding Collision #1 made him more susceptible to suffer postural problems in any subsequent injury, a factor that must be accounted for as a contingency in the assessment of damages.
- j) Mr. Cook's depression, which began in 2017 and has subsequently developed into a major depressive disorder, was the product of multiple factors, including the physical and psychological effects of Mr. Cook's collision-related injuries, Mr. Cook's separation from Ms. Behrenz, Mr. Cook's increasing financial difficulties, and Mr. Cook's fixation on or pre-occupation with perceived wrongs by various institutions including ICBC and various police agencies. Thus, the effects of Mr. Cook's collision-related injuries were one of a number of contributing causes for Mr. Cook's depression and major depressive disorder.

- k) In terms of Mr. Cook's prognosis for recovery in relation to the major depressive disorder, there is uncontested evidence that this condition is treatable with anti-depressant medication.
- l) It is possible that even if Mr. Cook had not been involved in the collisions, he would have developed a major depressive disorder. There is evidence that Mr. Cook has a pre-disposition to disproportionate fixations on perceived wrongs by public institutions or bureaucracies, as evidenced by his 13 year battle with WCB, and his subsequent disproportionate responses to perceived wrongs by ICBC and the police, completely unrelated to Mr. Cook's collisions. This possibility must be accounted for through a contingent adjustment in the assessment of damages.

(5) Assessment of Damages

[196] Mr. Cook claims pecuniary damages for his out of pocket vehicle repair costs. With respect to his personal injuries, Mr. Cook advances a non-pecuniary damages claim, as well as a pecuniary damages claim for past and future loss of income earning capacity, special damages, and costs of future care. I will deal firstly with Mr. Cook's property damage claim, and then go on to consider each aspect of his personal injury damages claim.

(5.1) Vehicle Damages

(5.1.1) Vehicle Damages in Relation to Collision #1

[197] Recall that in Collision #1, which took place on King George Boulevard in Surrey on 24 September 2006, Mr. Cook's truck was rear-ended by Mr. Kang's van. Mr. Kang testified that the only point of impact on Mr. Cook's truck was the trailer hitch, and he saw no visual damage at the collision scene. It is in this context that the defendants dispute Mr. Cook's claim for vehicle repairs and rental of a replacement vehicle in connection with Collision #1.

[198] Mr. Cook testified that there was damage to his trailer hitch and he had to pay about \$1,000 to have it replaced. His testimony was supported by a repair invoice in the amount of \$1,056.67, and photographs of his truck. Mr. Cook also testified that he had to rent a vehicle while the repairs were carried out, at a cost of \$1,440.85. He presented a vehicle rental invoice in that amount.

[199] Mr. Cook was cross-examined at some length with respect to the extent of damage to his trailer hitch. In response to the suggestion that the hitch was fine and Mr. Cook paid to have it replaced for no reason, he testified that when he took his truck to the repair shop, the hitch was removed for examination, found to be slightly bent, and would not go back onto his truck, so he had to have it replaced. The photographs tendered by the plaintiff and additional photographs tendered by the defendants through Mr. West appear to me to show a slight bend in the trailer hitch. I accept, based on the testimony of Mr. Cook and the photographs that the hitch was damaged and had to be replaced. This conclusion is supported by common sense, which suggests that Mr. Cook would not have paid out of

pocket to replace an undamaged hitch.

[200] The photographs of Mr. Cook's truck also show other damage, specifically to the back end, on and above the rear fender. This damage was clearly not caused by Mr. Kang's van, which only impacted Mr. Cook's trailer hitch. Mr. Cook agreed in cross-examination that this additional damage to his truck did not come from Collision #1. In fact, the invoice tendered by Mr. Cook indicates that the cost to remove and replace the trailer hitch was \$261 plus tax. The same invoice includes some \$675 plus tax for painting and body work associated with repairing and reinstalling the "right rail". The plaintiff is only entitled to damages in the amount of \$292.32 for removal and replacement of the trailer hitch.

[201] The vehicle rental receipt indicates that Mr. Cook had use of a rental vehicle for 16 days at a total cost of \$1,440.85. It seems to me that even without the repairs for vehicle damage unrelated to Collision #1, Mr. Cook would have had to rent a replacement vehicle while his truck was in the shop to remove and replace the trailer hitch. However, I find it hard to believe that would have taken 16 days. In the absence of any specific evidence from the plaintiff on this point, the only reasonable approach is to pro-rate the cost of the vehicle rental to accord with the cost of the collision-related repairs. Mr. Cook is thus entitled to \$398.60 on account of vehicle rental costs pending the repair of his truck.

[202] In the net result, Mr. Cook is awarded \$690.92 for the damage to his truck in Collision #1.

(5.1.2) Vehicle Damages in Relation to Collision #3 and Collision #4

[203] Mr. Cook testified that as a result of Collision #3, the rear bumper of his truck was damaged and had to be replaced at a cost of \$3,416. ICBC paid for those repairs, and Mr. Cook does not allege any further loss in connection with the damage to his truck in Collision #3.

[204] Mr. Cook testified that Collision #4 caused \$3,000 to \$4,000 in damage to his truck, but acknowledged that this was only a "guess". A vehicle repair estimate submitted to ICBC from a certified auto body shop estimates the cost of repairs at \$2,020.46 was tendered in evidence. It appears that ICBC paid for the repairs, and Mr. Cook did not advance a claim for any additional amount in his closing argument.

(5.2) Non-Pecuniary Damages

[205] The purpose of non-pecuniary damages is to compensate the plaintiff for pain and suffering, loss of amenities, or loss of enjoyment of life, recognizing the limitations inherent in trying to place a market value on such matters: *Gilliam v. Wiebe*, 2013 BCSC 565 at para. 68; *Pan v. Shihundu*, 2014 BCSC 504 at para. 109. The quantum of the award is determined not by reference to the nature of the particular injury in the abstract, but rather by the "ability to ameliorate the condition of the victim considering his or her particular situation": *Lindal v. Lindal*, [1981] 2 S.C.R. 629 [Lindal] at p. 637.

- [206] In *Stapley v. Hejslet*, 2006 BCCA 34 [Stapley] at para. 46 the Court provided a non-exhaustive list of factors to be taken into account in determining an appropriate award for non-pecuniary damages. These factors include the plaintiff's age, the nature of the injury, the severity and duration of the plaintiff's pain, emotional suffering, the extent of any disability, the effect on family and social relationships, impairment of the plaintiff's mental and physical abilities, the impact on the plaintiff's lifestyle, and any evidence of stoicism, with this last factor being a consideration which should not operate to penalize the plaintiff.
- [207] The case at bar involves a claim for damages associated with what are commonly referred to as soft tissue injuries resulting in chronic pain. In this context, the defendants cite *Price v. Kostryba* (1982), 70 B.C.L.R. 397, in which McEachern C.J.S.C., as he then was, expressed concern at para. 4 that in cases of whiplash-type soft tissue injuries, the defendant "is often at the mercy of" the plaintiff because complaints of pain "cannot easily be disproved". The Chief Justice then quoted from an earlier undecided case in which he reasoned that "the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery". Thus, the court should look for "evidence of a 'convincing' nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the normal recovery period". Yet even with these concerns, "the plaintiff's own evidence, if consistent with the surrounding circumstances", may be taken as sufficient.
- [208] I am mindful of the need for close scrutiny in assessing a claim for damage based on chronic pain where there is no objective evidence of a continuing injury. I am also cognizant of the credibility concerns with respect to the testimony of Mr. Cook. However, Mr. Cook's testimony about chronic pain does not stand on its own. There is objective evidence of ongoing injury or symptomology of a sort that is supportive of Mr. Cook's testimony. In particular, there is the evidence of Mr. Cook's treatment providers, Ms. Martens and Mr. Leyland-Harris, who gave similar descriptions of Mr. Cook's ongoing and recurring pelvic "rotation" or "upslip". This reliable and compelling objective evidence is entirely consistent with the expert opinion evidence of Dr. Kagan and Dr. Shuckett that Mr. Cook presents with right-sided "sciatic symptoms" or sciatica. All of this is supportive of Mr. Cook's testimony that he has suffered from and continues to suffer from neck, right shoulder, back, and leg pain significantly affecting his posture.
- [209] Still, I am mindful that Mr. Cook has been inclined to overstate the extent of his pain and, perhaps more significantly, the extent of disability or limitation flowing from his injuries. I have referred above to the issues with respect to Mr. Cook's credibility, and I note my earlier finding that Mr. Cook's physical limitations are not as significant as he claimed them to be in his testimony.

[210] Having regard to the factors listed in Stapley, I would summarize the relevant circumstances of Mr. Cook's case as follows:

- a) Mr. Cook was 38 years old when the first collision in issue in this proceeding occurred. At that time he was not an entirely healthy or injury-free person, having unresolved complaints of soft-tissue pain as reflected in entries within clinical records confirmed in cross-examination of Dr. Kagan.
- b) In Collision #1, Mr. Cook suffered injuries that had the effect of aggravating his pre-existing conditions. He also, within a matter of months, developed postural problems associated with his whiplash-type injuries, the most significant physical manifestation of which is a notable pelvic "rotation" or "upslip". Since Collision #1, Mr. Cook has had chronic pain in his neck, right shoulder, back, and legs, as evidenced by the aforementioned pelvic upslip.
- c) The continuing symptoms from Collision #1 have been exacerbated by Collision #3 (which occurred when Mr. Cook was 46 years old) and Collision #4 (which occurred when Mr. Cook was 48 years old).
- d) Mr. Cook has also experienced a number of independent intervening events, including the effects of Collision #2, and left knee pain from a torn meniscus which was surgically repaired and is now resolved.
- e) Mr. Cook is now 52 years old. He will likely continue to experience chronic pain for the indefinite future. He is able to obtain intermittent relief from his postural problems through passive physical therapies, although the postural problem is a recurring issue which can be expected to continue indefinitely.
- f) In terms of how the injuries have impacted on Mr. Cook's lifestyle, prior to the collisions Mr. Cook was a reasonably active person, though not entirely free from physical limitations. He was an avid golfer, and enjoyed attending live sporting events, although I find as a fact that Mr. Cook did have some pre-existing limitation on his ability to sit comfortably for prolonged periods of time. Since the collisions, Mr. Cook no longer enjoys playing golf and finds live sporting events less enjoyable. Mr. Cook is also limited in his ability to participate in various sporting and recreational pursuits with his son. Given that his son is now 10 years old, I would not understate the impact of this particular limitation on Mr. Cook and his relationship with his son.
- g) Starting some time in 2017, Mr. Cook experienced depression which has since developed into a major depressive disorder. This condition is treatable with anti-depressant medication and could be expected to resolve within a reasonable period of time. There is some possibility that even in the absence of his collision-related injuries Mr. Cook would have experienced depression developing into a major depressive disorder.

- h) As a consequence of both his physical injuries and, more significantly, his depression, Mr. Cook's personal relationships have suffered and he has become socially isolated. There is some possibility or likelihood that even in the absence of the collision-related injuries and their effects, Mr. Cook's social life and relationships would have significantly deteriorated in any event, due to a predisposition to become disproportionately fixated on perceived wrongs at the hands of government agencies or bureaucratic institutions.
- [211] Counsel for Mr. Cook cited a collection of cases with inflation-adjusted non-pecuniary damage awards ranging from \$86,000 to \$200,000. See *Hubbs v. Escueta*, 2013 BCSC 103; *Easton v. Wolovets*, 2015 BCSC 210; *Yannacopoulos v. Cronk*, 2015 BCSC 1154; *Jafferi v. Hardcastle*, 2018 BCSC 486; *McCann v. Anderson*, 2019 BCSC 245; *Gill v. Apeldoorn*, 2019 BCSC 798. Mr. Cook argues that the circumstances in his case call for an award in the upper end of this range. He seeks non-pecuniary damages of \$175,000.
- [212] Counsel for the defendants cited cases with inflation-adjusted awards ranging from \$44,000 to \$72,000. See *Pan v. Shihundu*, 2014 BCSC 504; *Demidas v. Poinen*, 2012 BCSC 416; *Keenan v. Fletcher*, 2011 BCSC 520; *Saidy v. Louzado*, 2019 BCSC 281; *Jiwani v. Borodi*, 2014 BCSC 1164. The defendants take the position that Mr. Cook should receive non-pecuniary damages in that range.
- [213] While awards in other cases may be useful in gauging what is reasonable, the case law does not establish a tariff for any particular kind of injury, and the award must always be determined based on an individualized assessment of the plaintiff's loss: *Stapley* at para. 45, citing *Lindal* at p. 637. Awards in other cases can assist in identifying a "general range of damages". When considering awards made in other cases, the court must bear in mind the obvious reality that no two plaintiffs will ever be in exactly the same position, suffer the same kind of injury, have the same reaction, or respond to treatment in the same way: *Jones v. Davenport*, 2008 BCSC 18 at para. 77.
- [214] In the case at bar, Mr. Cook's soft-tissue injuries are not insignificant and have obviously caused him considerable discomfort for a number of years. Mr. Cook is now 52 years old and there is no real prospect that his physical condition will improve. The injuries have had moderate impacts upon his lifestyle, although it must also be acknowledged that Mr. Cook was not entirely pain free prior to the collisions. Mr. Cook has also suffered depression, with physical symptoms and effects on his personal and social relationships, although the depression and its effects only emerged in the past several years and can be expected to resolve with treatment.
- [215] In my view an appropriate global award of damages for Mr. Cook's collision-related injuries is \$110,000, subject to adjustments for certain contingencies as follows. I would reduce the award by 30% to address the contingency that Mr. Cook's pre-existing complaints would have developed into symptoms equal to or overlapping with his current condition, taking into account the impact of Collision #2 as an intervening event. I would also reduce the award by a further 10% for the contingency that Mr. Cook would have experienced a

depressive disorder with physical and social effects equal to or overlapping with his current condition, keeping in mind my finding that the depression is likely to resolve with treatment. In the net result I would award Mr. Cook non-pecuniary damages of \$66,000.

(5.3) Loss of Past Earning Capacity

[216] A claim for loss of past earnings may be a straightforward matter where it is based on a readily ascertainable "transparent income loss". However, where the claim involves an alleged loss of earning capacity that turns not only on "past facts" but also "hypothetical events", the analysis is more nuanced, as explained in *Gao v. Dietrich*, 2018 BCCA 372 at para. 32-36, applying, inter alia, *Grewal v. Naumann*, 2017 BCCA 158 at para. 43-54 (per Goepel J.A. in dissent in the result, but with the concurrence of the majority on this point per D. Smith J.A. at para. 66), and *Smith v. Knudsen*, 2004 BCCA 613 at para. 29.

[217] I would summarize the principles governing a claim for loss of past earning capacity based on what "might have happened" as follows:

- a) To establish the loss, the plaintiff must show (i) impairment of earning capacity, and (ii) a real and substantial possibility of an event resulting in a loss of earnings: *Grewal* at para. 48.
- b) In this analysis, past facts must be proven on a balance of probabilities. With respect to hypothetical events, the standard is not proof on a balance of probabilities but rather proof of a real and substantial possibility as opposed to mere speculation: *Gao* at para. 34-40.
- c) Where a loss is established, damages must then be assessed using either the "earnings approach" or the "capital asset approach": *Grewal* at para. 48.

[218] In the case at bar, the plaintiff's written submission begins with a concession that it is "difficult to assess Mr. Cook's income loss". Plaintiff's counsel makes it clear that Mr. Cook is not asserting a loss of "gambling income", because the nature of gambling makes it "too speculative" and over the long run "the house always wins". Plaintiff's counsel further accepts that it would not be reasonable to base a claim of lost earning capacity on Mr. Cook's real estate development project, which might fairly have been regarded as a "one off" that may never have been repeated. Plaintiff's counsel ultimately rested Mr. Cook's claim for loss of past earning capacity on the assertion that if he had not been injured in the collisions, Mr. Cook would have continued to earn income of \$56,667 per year, representing his average annual income from Edward's International over the three year period from 2004 to 2006.

[219] Recall that Edward's International is a closely held corporation, owned by Mr. Cook, through which he ran two separate business lines. One line of business related to personal security and counter-surveillance services, and the other business line involved the sale of promotional items including t-shirts and other merchandise bearing luxury automobile logos. Mr. Cook earned T4 income of \$60,000 in 2004, \$60,000 in 2005, and \$50,000 in 2006, in the form of a salary or management fees from Edward's International. Mr. Cook relies on this evidence to assert that if he had not been involved in the collisions, there is a realistic

possibility that he would have earned an average salary of \$56,667 per year from August of 2010 up to the date of trial in September of 2019.

- [220] I conclude that Mr. Cook's claim for loss of past earning capacity must fail due to an absence of proof that he suffered an actual loss capacity. There is no evidence that as a result of his injuries from Collisions #1, #3, and #4, Mr. Cook was physically limited in his ability to carry on either of the two lines of business that he previously conducted through Edward's International, or work in any other kind of occupation that would furnish him with a comparable income.
- [221] Mr. Lauder's opinion was that Cook is not physically capable of meeting some of the job demands of his stated pre-collision occupation as a "construction worker". Accepting that Mr. Cook was physically limited in his ability to perform some of the more physical aspects of construction work, the reality is that he was able to and did in fact continue to supervise the Gore Avenue construction project, seeing it through to its conclusion in 2010. None of this evidence advances Mr. Cook's position that he suffered a loss of capacity to carry on the kind of business that he had previously run through Edward's International.
- [222] In his testimony in chief, Mr. Cook did not say he was unable to work in any capacity at any particular point in time following the collisions. Mr. Cook testified that he wrapped up his residential construction project in 2010, estimating that he might have made about \$1,000,000 in total profit from the sale of the three detached homes erected on Gore Avenue. He went on to describe his subsequent sources of income, his investments, and his financial situation, but gave no evidence about any effort to find work, or to pursue any particular occupation or career path subsequent to the residential construction undertaking that concluded almost ten years ago.
- [223] When asked in cross-examination why he was not presently looking for work, his two-pronged explanation was that the pain from the collisions has not yet gone away, and he was looking for something to do in life. He then added that he was waiting for doctors to tell him what he can and cannot do. I am not sure what to make of that particular remark, but I do not consider it supportive of the assertion that Mr. Cook suffered any actual loss of capacity to earn income. The part of Mr. Cook's answer that had the greatest ring of truth was his frank acknowledgment that he is 'looking for something to do in life', or words to that effect.
- [224] In the result, Mr. Cook has utterly failed to prove any material impairment of his earning capacity. There is therefore no need to undertake any valuation of loss. Mr. Cook's claim for loss of past earning capacity must fail.

(5.4) Loss of Future Earning Capacity

- [225] Mr. Cook's claim for loss of future earning capacity rests on the same footing as his past earning capacity claim and it fails for the same reason.

(5.5) Special Damages

- [226] A plaintiff is entitled to reasonable out-of-pocket expenses incurred as a result of the defendant's tortious conduct: *Hollyer v. Gaston*, 2016 BCSC 1401 at para. 140, applying *Hill v. Murray*, 2014 BCSC 1528 at para. 213. For medical expenses, evidence of medical justification is a factor in determining reasonableness: *Redl v. Sellin*, 2013 BCSC 581 at para. 55.
- [227] Mr. Cook's claim for special damages is based on calculations in a collection of spreadsheets, namely spreadsheet #1 (exhibit 7A) and spreadsheet #2 (exhibit 7), both of which were supported by receipts. My analysis of the special damages claimed by Mr. Cook is as follows.

(5.5.1) Prescription Medications

- [228] Spreadsheet #1 (Ex. 7A) lists a total of \$6,605.56 in prescription medications. This must be reduced by \$469.09 for costs of Ramipril and Hydrochlorothiazide, two blood pressure medications not tied to Mr. Cook's collision-related injuries. This leaves \$6,136.47. Of this subtotal, \$1,875.73 relates to Zopiclone, Raberazole, and Oxycodone, three medications Mr. Cook had been taking before Collision #1. I would reduce the claim for these particular drugs by 30% to address the contingencies that Mr. Cook's pre-existing complaints would have required him to take these drugs anyway, or alternatively those complaints would have developed into symptoms equal to or overlapping with his current condition. This reduces the total by \$562.71. This leaves a total of \$5,573.76 in medication costs from spreadsheet #1.
- [229] Spreadsheet #2 (Ex. 7) lists a total of \$5,296.23 of out of pocket expenditures on medication. From this, I would deduct the following amounts:
- a) A total of \$608.53 for costs of Ramipril and Hydrochlorothiazide, drugs Mr. Cook used for treatment of a high blood pressure condition with no connection to his collision-related injuries.
 - b) A total of \$3,297.98, for Cialis and Testosterone. Mr. Cook testified that at a certain point he experienced reduced sex drive and suffered from the effects of low testosterone. Mr. Cook came to believe, based on a consultation with a specialist, Dr. Ur, that he had developed a low testosterone condition due to prolonged opiate use. The clinical records of Dr. Kagan contained correspondence from Dr. Ur, admissible under the document agreement to prove that Mr. Cook was prescribed testosterone injections and Cialis, but not admissible to prove the nature or cause of the underlying condition. Although Mr. Cook took oxycodone after Collision #1, there is also evidence that Mr. Cook had been taking prescription opiates for pre-existing complaints. On this record, it would not be fair to the defendants to allow the plaintiff to base his claim for recovery of these expenses on a hearsay expert opinion not placed before the court in an admissible expert report. Even if it were admissible, Dr. Ur's untested hearsay opinion - consisting of a single sentence in a letter to Dr. Kagan - would not

provide the court with enough information on which to base a finding that collisions #1, #3 and #4 materially contributed to Mr. Cook's low testosterone condition.

- c) A further \$174.26, representing 40% of the \$580.87 which Mr. Cook spent on Zopiclone, Raberazole. This reduction is necessary to account for the contingencies discussed above, namely that even without collisions #1, #3, and #4, Mr. Cook's pre-existing complaints would have required him to take these drugs anyway, or alternatively would have developed into symptoms equal to or overlapping with his post-collision condition.

This leaves \$1,215.46 in prescription medication costs from spreadsheet #2.

[230] The allowable expenses for prescription medications can therefore be calculated as \$5,573.76 from Spreadsheet #1 (Ex. 7A) and \$1,215.46 from Spreadsheet #2 (Ex. 7A), for a total of \$6,789.22.

(5.5.2) Physiotherapy Costs

[231] Spreadsheet #1 (Ex. 7A) lists \$2,170 in physiotherapy costs. Spreadsheet #2 (Ex. 7) lists a further \$60,400.86 in physiotherapy costs. I accept, based on the evidence of Mr. Cook and his two principal therapists, Ms. Martens and Mr. Leyland-Harris, that as a general rule and subject to the limitations discussed below, the amounts paid by Mr. Cook for physiotherapy treatments are reasonable expenses incurred to treat his injuries and associated chronic pain and postural problems.

[232] Counsel for the defendants submitted that Mr. Cook should not be compensated for these physiotherapy costs because the treatments were not "time limited and goal oriented". Counsel cites the evidence of Ms. Martens and Mr. Leyland-Harris that at the beginning of each session Mr. Cook would present with a pelvic rotation or upslip, which would dissipate by the end of the treatment, only to be present again at the beginning of the next treatment session. Thus, over a number of years, Mr. Cook's physiotherapy treatments have yielded no overall improvement in his condition.

[233] Despite this evidence, I do not agree with counsel's submission that Mr. Cook's physiotherapy treatments can be dismissed as "repetitive" and "unhelpful". The fact is, Mr. Cook's chronic pain has caused him to suffer from an objectively identifiable postural problem, referred to in the evidence as a pelvic rotation or pelvic upslip. The physiotherapy treatments have been effective in ameliorating that condition, albeit without making it go away. The fact that Mr. Cook's postural problem is recurrent or persistent does not mean that the physiotherapy he has received has served no point. As a general rule, and subject to the limitations below, I find that the physiotherapy treatments were in response to Mr. Cook's collision-related injuries and are reasonable expenses for which he should be compensated.

- [234] Of the \$60,400.86 in physiotherapy costs listed in Spreadsheet #2, a total of \$24,015.86 is for personal trainer expenses from 2011 to 2014. The evidence indicates that Mr. Cook paid these amounts for strength and conditioning training with a personal trainer, Mr. Bergstrom, as "part and parcel" of the physiotherapy program administered by Mr. Leyland-Harris.
- [235] The defendants question whether it is reasonable to compensate Mr. Cook for his decision to pay roughly \$8,000 per year for one-on-one personal training sessions with an elite professional trainer. The defendants point out that Mr. Lauder, who prepared Mr. Cook's cost of future care report, was not aware that Mr. Cook had incurred tens of thousand of dollars in personal trainer costs. Mr. Lauder testified in cross-examination that he did not support or recommend personal fitness training, and his costs of future care report only recommend six to eight weeks of treatment and instruction by a trained kinesiologist at a total cost of \$1,300 to \$1,700. Also recall the evidence of Ms. Martens, Mr. Cook's initial physiotherapist, who provided Mr. Cook with a home-based exercise and stretching program.
- [236] Taking into account all of this evidence, I agree with the defendants that Mr. Cook's decision to spend some \$8,000 per year for one-on-one personal training sessions was extravagant, unreasonable, and disproportionate, having regard to the other courses of action open to him, including the option of home-based exercise and stretching, or the option of obtaining a gym pass to do self-directed fitness training with input from his two physiotherapists. I would therefore reduce the amount awarded for personal training by two-thirds. This reduces the allowable physiotherapy expenses to \$46,570.
- [237] The defendants also submit that it was unreasonable for Mr. Cook to obtain treatment from two separate physiotherapists, Ms. Martens and Mr. Leyland-Harris for overlapping time periods. The period of overlap is between December 2013 (when Mr. Cook started receiving treatment from Mr. Leyland-Harris at Level 10) and June 2015 (when Mr. Cook stopped receiving treatment from Ms. Martens at Urban Active). The defendants say this was occurring during a time when Mr. Cook was under the care of Dr. Kagan, who "abdicated her responsibility" for overseeing Mr. Cook's physiotherapy treatment. Although I do not agree with that submission, I do accept the argument that it was not reasonable for Mr. Cook to be receiving treatments from two separate physiotherapy clinics over a period of some 18 months. Mr. Cook's list of physiotherapy expenses from Level 10 (Ex. 7D) indicates that during this time frame, Mr. Cook was seeing Mr. Leyland-Harris for treatment one or two times per week. The list of physiotherapy expenses from Urban Active (Ex. 7C) indicates that Mr. Cook was also seeing Ms. Martens, at less regular intervals, over this same time frame. I accept the submission that it would not be reasonable to require the defendants to compensate Mr. Cook for this redundancy in care. Using the figures from Urban Active (Ex. 7C), I calculate the value of the duplicate treatment as \$3,530. I would deduct this amount, reducing the allowable physiotherapy expenses to \$43,050.

[238] Finally, I would reduce the allowable physiotherapy expenses of \$43,050 by 30% on account of the contingency that Mr. Cook's pre-existing complaints would have developed into symptoms equal to or overlapping with his current condition, which contingency includes the effects of Collision #2 as an intervening event. In the net result, I would award Mr. Cook \$30,135 for physiotherapy costs incurred to the date of trial.

(5.5.3) Gym Passes

[239] Spreadsheet #2 (Ex. 7) lists a total of \$812.45 for gym fees incurred by Mr. Cook from December of 2017 to September of 2019. The defendants say Mr. Cook should not be compensated for this cost because, "Mr. Cook had for many years been involved in a regular gym routine". That may be true, but I accept Mr. Cook's testimony that his gym attendance has now become an important part of his treatment regimen. This is supported by the expert opinion evidence of Dr. Kagan, who agreed that Mr. Cook had in fact been going to gym before the collisions, but added that this might not have involved the same kind of activity as the post-collision strengthening exercises which she recommended and supported. I accept that Mr. Cook's gym fees between 2017 and 2019 were incurred to assist him in dealing with his collision-related injuries and that these expenses are reasonable. I would allow this amount.

(5.5.4) Travel Expenses

[240] Spreadsheet #2 (Ex. 7) lists a total of \$3,718.75 in travel expenses, calculated at a rate of \$0.25 per km. I would allow 55% of these expenses, in proportion to the amounts allowed for all other categories of special expenses. I would thus award Mr. Cook \$2,231.25 to compensate him for travel expenses incurred in connection with treatment of his collision-related injuries.

(5.5.5) Miscellaneous Expense

[241] Spreadsheet #2 (Ex. 7) lists \$359.54 in miscellaneous expenses. Of this, I would deduct \$243.61 for syringes and swabs, which I infer were related to Mr. Cook's prescription testosterone injections. I also deduct \$89.25 for a parking ticket. This leaves \$26.64 in miscellaneous expenses (parking fees), which I would allow.

(5.5.6) Total Allowable Special Expenses

[242] Mr. Cook is awarded \$39,995 for special expenses.

(5.6) Costs of Future Care

[243] The objective of damages for costs of future care is to provide for care that would restore the plaintiff to his or her pre-accident condition, so far as that is possible: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 175. Damages are to be assessed based on what is shown to be reasonably necessary or justifiable on medical evidence to "preserve and promote the plaintiff's medical and physical health": *Sendher v. Wong*, 2014 BCSC 140 at para. 192, applying *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at p.

83.

[244] Thus, the test for determining an appropriate award for costs of future care is "an objective one", under which (i) "medical justification" must be shown for the items claimed, and (ii) the claims must be "reasonable": Sendher at para. 193 citing Milina at p. 84. In Penner v. Insurance Corporation of British Columbia, 2011 BCCA 135 at para. 13, Newbury J.A. encouraged trial judges not to lose sight of "common sense" in assessing claims under this head, "however much they may be recommended by experts in the field".

(5.6.1) Medications

[245] I would allow 60% of Mr. Cook's claims for Cyclobenzaprine, extra strength Tylenol, Rabeprazole, and Zopiclone. This accounts for the contingency that Mr. Cook's pre-existing complaints would have developed into symptoms equal to or overlapping with his current condition, including the effects of Collision #2 as an intervening event.

(5.6.2) Physiotherapy

[246] Mr. Cook seeks an award allowing for weekly physiotherapy treatments, at an annual cost of \$4,080 per year, for an indefinite period. He relies on Mr. Lauder's costs of future care report, referencing Dr. Kagan's opinion that such treatment would be to Mr. Cook's benefit to "deal with acute spasm flares and pain".

[247] The defendants argue, based on the evidence Ms. Martens and Mr. Leyland-Harris, that Mr. Cook's physiotherapy treatments can be expected to provide only "temporary relief" with no prospect of "permanent improvement". Counsel relies on Ho v. Dosanjh, 2010 BCSC 845 at para. 81 and Hollyer v. Gaston, 2016 BCSC 1401 at para. 129 for the proposition that treatments providing a plaintiff with nothing more than "periodic temporary relief", with no hope of any "improvement", are not properly addressed by a cost of future care award. Under the reasoning in Ho, the plaintiff's inclination to obtain future treatments of this sort is best taken into account "as an aspect of the non-pecuniary damage award".

[248] I accept the notion, reflected in Ho, that treatments providing the plaintiff with nothing more than solace for ongoing pain and suffering are properly accounted for under the rubric of non-pecuniary damages. However, on the evidence in this case I would not put Mr. Cook's physiotherapy treatments into this category.

[249] As explained above, Mr. Cook's physiotherapy involves treatment for a specific postural problem, referred to by the witnesses as a pelvic rotation or pelvic upslip. The condition is persistent or recurrent, and the evidence of Mr. Leyland-Harris is that once-per-week physiotherapy sessions are effective in treating it. The physiotherapy sessions not only reduce Mr. Cook's pain, they also improve his posture. I would not characterize this as therapy affording mere "temporary relief" from pain and nothing more. I conclude that once per week physiotherapy sessions are a medically justified treatment, reasonably necessary to promote Mr. Cook's physical health as contemplated in Milina.

[250] With regard to duration of treatment, Mr. Lauder agreed in cross-examination that Mr. Cook's physiotherapy should be goal-oriented and time-limited, but the costs of future care report does not propose any specific time frame. Mr. Lauder's physiotherapy recommendation was based upon the opinion of Dr. Kagan, who in turn proposed physiotherapy to help Mr. Cook manage "acute spasm flares and pain". Dr. Kagan's overall prognosis was that even with therapy, Mr. Cook would likely continue to experience ongoing sequelae and pain. On this basis, I conclude that Mr. Cook will require physiotherapy on an ongoing basis, indefinitely.

[251] It is still necessary to adjust the physiotherapy award to account for the contingent possibility that even if Mr. Cook had not been involved in Collisions #1, #3, and #4, his pre-existing complaints would have developed into symptoms equal to or overlapping with his current condition. It is also necessary to take into account the effects of Collision #2 as an independent intervening event. I would reduce the physiotherapy component of the award by 30% on account of these possibilities, reducing the amount to \$2,856 per year.

(5.6.3) Gym Membership

[252] Mr. Cook says the future care award should provide for an annual gym membership, at a cost of \$403.55 per year until the age of 65 and \$302.70 per year thereafter. The defendants did not specifically address this request, but did argue against Mr. Cook's claim for recovery of gym fees as a special cost on the basis that he "had for many years been involved in a regular gym routine". I rejected that argument, relying upon the testimony of Mr. Cook and the expert opinion of Dr. Kagan that Mr. Cook would benefit from a specific fitness regime in response to his treatment-related injuries. Mr. Lauder's costs of future care report recommends that Mr. Cook should adhere to an exercise program to improve and maintain his physical strength, endurance, and range of motion. I accept this evidence and find that it meets the requirements of medical justification and reasonableness.

(5.6.4) Occupational Therapy and Home Therapy Assessments

[253] Mr. Cook argues that the future care award should include \$1,776 for an occupational therapy assessment and a further \$222 for an at home assessment by a therapist. I found above that Mr. Cook's functional capacity has only been limited to the extent that he is unable to (i) perform some of the work responsibilities of a construction worker, and (ii) complete heavier or more arduous household tasks such as seasonal yard work and household maintenance and repair. On these findings, I am not satisfied that any assessment from an occupation therapist is justified or reasonable.

(5.6.5) Active Rehabilitation and Kinesiology

[254] Mr. Cook says the future care award should include \$1,752 to cover the cost of 24 kinesiology sessions. Mr. Lauder's cost of future care report states that Mr. Cook would benefit from "supervised active rehabilitation sessions in order to increase his overall level of function as well as his confidence with exercise".

[255] The fact is that Mr. Cook has already had the benefit of some three years of one-on-one fitness training, as part of Mr. Leyland-Harris's treatment plan. Mr. Cook had the benefit of working with an elite personal trainer who has since gone on to join the training staff of a professional basketball team. I would not expect Mr. Cook to have any appreciable deficit in his "confidence with exercise". On this evidence, I am not satisfied that Mr. Cook reasonably requires 24 sessions or "supervised active rehabilitation".

[256] However, the evidence also indicates that Mr. Cook has not had the benefit of a personal trainer since 2014. I would thus consider it justifiable and reasonable for him to receive six kinesiology sessions, to get updated instruction or training concerning his collision-related exercise needs, at a total cost of \$438.

(5.6.6) Conclusion Regarding Costs of Future Care

[257] I conclude that Mr. Cook is entitled to \$92,607 for costs of future care.

(6) Summary

[258] In summary, I award the following damages:

Head of Damage

Award

Vehicle Damage (Collision #1)

\$ 690.92

Non-Pecuniary Damages

\$ 66,000.00

Loss of Past Earning Capacity

\$ 0.00

Loss of Future Earning Capacity

\$ 0.00

Special Damages

\$ 39,995.00

Cost of Future Care

\$ 92,607.00

TOTAL

\$ 199,292.92

(7) Costs

[259] If the parties are unable to agree on costs, they can file written submissions. Counsel for the plaintiff may file written submissions of four pages or less (plus an affidavit containing any supporting materials) within three weeks of the release of these reasons. Counsel for the defendants may file written submissions of four pages or less (plus an affidavit containing any supporting materials) within three weeks of receiving the plaintiff's written submissions. Counsel for the plaintiff may file a reply of two pages or less (plus any reply affidavit material) within one week of receiving the written submissions of the defendants. If either party takes the view that submissions on costs cannot effectively be dealt with in writing, that party may, within the time limits set out above, submit a request to schedule a further appearance for oral submissions on costs.

"Riley J."

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