
CANADA / JUDGMENT

Einboden v. Porter

2022 BCSC 29

COURT

Supreme Court of British Columbia

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2022 BCSC 29 Einboden v. Porter

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Einboden v. Porter,

2022 BCSC 29

Date: 20220111

Docket: 043478

Registry: Victoria

Between:

Allen Einboden

Plaintiff

And:

Caren Nicole Porter

Defendant

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

Counsel for the Plaintiff:

Allen Einboden

Counsel for the Defendant:

Michael Mark

T. Reid Fraser

Place and Date of Trial:

Victoria, B.C.

May 10 - 14, 17 - 19, 2021

October 4 - 8, 12 - 15 & 18, 2021

Place and Date of Judgment:

Victoria, B.C.

January 11, 2022

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Introduction

- [1] On August 16, 2002, the plaintiff, Allen Einboden, was in a motor vehicle accident. Two years later, on August 13, 2004, Mr. Einboden commenced this action for damages against the defendant for negligent operation of the vehicle that struck him. On May 10, 2010, this trial began. The trial was adjourned on May 19, 2010 by agreement between the parties, in part because the trial was not going to complete within the time scheduled, but primarily so that Mr. Einboden could be examined by medical experts arranged by the defendant. On October 2, 2018 the defendant applied unsuccessfully to dismiss the action for want of prosecution. The trial resumed October 4, 2021.
- [2] The extraordinary passage of time between the accident and the conclusion of the trial has made the assessment of damages more difficult. If delay has resulted in confusion in the evidence, or problems in proving losses, the plaintiff has only himself to blame.
- [3] Mr. Einboden's wife has represented him throughout, acting as his agent, as his lawyer was granted permission to withdraw as counsel in an opposed application in 2008. I granted that unusual accommodation because on the first day of trial in 2010 it was clear that Mr. Einboden was in no condition to conduct his own trial. When the trial started, Mr. Einboden was suffering from avascular necrosis of his left hip, and was taking potent pain killing medications that affected his thinking and his ability to communicate clearly.

- [4] Unsurprisingly, the unusual and deplorable gap of ten years in the trial has presented problems, as has the unusual way in which both segments of the trial progressed, with both parties interleaving witnesses when convenient to them.

The Accident

- [5] Mr. Einboden was stopped at a red light at the intersection of the Patricia Bay Highway and Sayward Road in Saanich, BC in a van he had borrowed from his friend, Nathan Black, when he was struck from the rear by a vehicle operated by the defendant, Ms. Porter.
- [6] Mr. Einboden testified that he had no warning before the impact, that he was in an awkward position, bent forward and to his right when struck, and that he was pushing himself upright with his left leg at the moment of impact. He said he felt immediate pain in his left leg, his head snapped backward, and he felt himself losing consciousness. When he regained awareness he felt a white hot burning at the base of his skull, in the back of his head, and down his spine. He described an intense burning over his entire body and his nervous system. He felt pins and needles.
- [7] Mr. Einboden was taken by ambulance to a hospital where he was assessed and released the same day.
- [8] At the time of the accident, Mr. Einboden was in the process of moving with his family to Florida. His wife and children were already in Florida, and Mr. Einboden had returned to Victoria to arrange transport of the family's furniture and personal effects out of storage to Florida.

Evidence

- [9] Mr. Einboden was born May 27, 1961. He is married and has three children. He has a grade twelve education, plus additional military training.

Work History

- [10] Until 1994, Mr. Einboden was in the Canadian Armed Forces ("CAF"), where he was a military pilot with the rank of captain. He grounded himself from flying for six months in October 1993 because of fatigue, and renewed his non-flying status for another six months in 1994. Mr. Einboden was discharged from the CAF in October 1994, during a period of downsizing in the military, on medical grounds with a severance payment and a disability pension.
- [11] While in the military, Mr. Einboden became involved in two projects in which he purchased houses, renovated them, and then sold them. The evidence is sparse, but I can find that between September 1989 and February 1990 he and another person bought a house for \$141,000 and resold it for \$205,000, and between June 1990 and June 1991 Mr. Einboden bought another house for \$150,000 and resold it for \$189,000. While there is some evidence from Mr. Einboden about the scope of the renovations done to these houses, there was little

or no evidence about the cost of materials or labour put into the renovations. Given the state of the evidence, I cannot assess whether or not either or both of these projects produced a net profit, or its extent.

- [12] Mr. Einboden also formed a company called Pace Ventures, through which he designed, manufactured and distributed jigsaw puzzles. Mr. Einboden testified that this business operated at a loss before he dissolved it, and in 2021 he could not recall the year of dissolution. He testified that he had to close this business after he began to experience fatigue in 1992. I infer that the jigsaw business stopped operating several years before the accident.
- [13] In 1993 or 1994, Mr. Einboden became involved in distributing products, and recruiting others to distribute products, for a company called Amway. This required a fair amount of travel, mostly by vehicle with Mr. Einboden driving, as well as making presentations to either prospective recruits or customers. Records show that the Amway business generated gross sales of \$25,765 in 1995, \$56,111 in 1996, \$62,451 in 1997, \$35,909 in 1998, \$8,623 in 1999, \$4,720 in 2000, and \$5,041 in 2001. Tax records show that Mr. Einboden reported net losses in each of those years, after considering the cost of acquiring the products and expenses. Mr. Einboden testified that the raw numbers did not do justice to the Amway business, that he and his family got benefits from some of the claimed expenses, and that the Canada Revenue Agency ("CRA") had reassessed his tax returns from these years. He testified that the business had not reached a stage where either he or Ms. Einboden could draw a salary from it.
- [14] Mr. Einboden testified that his business relationship with Amway was significantly impaired when his superiors learned that he was having an affair with another Amway representative. He testified that the affair was before 1997, and estimated that it occurred in the 1995-1996 fiscal year. He testified that one result of this indiscretion was that he was asked to withdraw from some portion of the Amway business, and that affected his ability to earn money through Amway. He also testified that he was forced to leave Amway and dissolve his business relationship, or to step aside or withdraw from the most lucrative part of the business. This was all before the 2002 accident.
- [15] At some point before the accident, the CRA reassessed Mr. Einboden, claiming that he owed a considerable amount of money in unpaid taxes. Mr. Einboden testified that the claims advanced exceeded \$100,000. Mr. Einboden disputed these claims and became embroiled in proceedings with the CRA that were ongoing at the time of the accident and continue to this day.
- [16] Mr. Einboden testified to another business venture he intended to embark on before the accident. He said that he had arranged to rent a 53-foot trailer to move his household goods from Victoria to Florida, and estimated that his family's goods would only require 20 of the 53 feet. He planned to sell the excess trailer space to others, on the basis that he would, for a fee, deliver their goods wherever the owner required. He said he expected this plan to

generate a profit, making the transport of his household effects from Victoria to Florida an income generating venture, rather than a cost of moving. He also hoped to carry on this business for profit after he had completed his move.

Medical History

- [17] Mr. Einboden's medical history is both relevant and complicated. He was in a rear end collision in July 1987, as a result of which he suffered left leg and right knee pain which completely resolved by the end of that year. Not long after he grounded himself from flying in 1993, Mr. Einboden experienced a dropped foot on his left side. He saw a military doctor, who referred him to a hospital in Victoria and in December 1993 he saw a neurologist. The neurologist investigated a possible diagnosis of multiple sclerosis with inconclusive results. Mr. Einboden testified that the combination of circumstances including his dropped foot, his decision to ground himself from flying because of fatigue, and downsizing of the CAF led to his 1994 departure from the military.

Dr. McQueen

- [18] Dr. McQueen was Mr. Einboden's family physician from October 1994 to August 2002. He did not provide a written opinion, but instead was called to testify about Mr. Einboden's complaints to him, his observations of Mr. Einboden, and any treatments he prescribed during those years. He testified that Mr. Einboden had complained intermittently of tingling numbness and weakness in his left foot on overexertion, as well as chronic fatigue and depression. He prescribed medication for anxiety. Dr. McQueen testified that he saw Mr. Einboden in 1995 for complaints of fatigue, forgetfulness, poor concentration and anxiety as well as a pins and needles sensation in both palms. Dr. McQueen said that in mid-1996 Mr. Einboden complained of increased mood swings, loss of appetite, occasional tearfulness, and anhedonia, which he said was not feeling like doing anything. Dr. McQueen testified that he never saw signs of hypomania in Mr. Einboden. In September 1999, Mr. Einboden complained to Dr. McQueen of fatigue, headaches, mild left foot drop, and a sluggish feeling in his legs.
- [19] In April 2002, Dr. McQueen referred Mr. Einboden to Dr. Parton, a neurologist practising in Victoria, whose practice focused on multiple sclerosis. Dr. Parton testified on the same basis as Dr. McQueen. Mr. Einboden told Dr. Parton that his leg felt worse on heavy exercise and he had pain, twitching and cramping in his left leg and foot. Dr. Parton described Mr. Einboden's multiple sclerosis diagnosis as somewhat tentative, somewhere in a range from possible to probable.

- [20] Dr. McQueen testified that before the accident he treated Mr. Einboden for signs of depression associated with the symptoms of multiple sclerosis, and that in 1998 another physician had treated Mr. Einboden for a hypomanic episode for which he was medicated. Otherwise, Mr. Einboden presented with the usual coughs and colds Dr. McQueen would expect. He described Mr. Einboden as reasonably healthy overall but that Mr. Einboden complained of chronic fatigue if he overexerted himself or was stressed by his work.
- [21] When asked about a diagnosis by another doctor, Dr. MacLeod, of bipolar disorder, Dr. McQueen said that he had never seen signs of mania or hypomania in Mr. Einboden. He testified that in January 1999 Mr. Einboden complained of a lack of interest in his wife and family. In September 1999, Mr. Einboden complained of fatigue, headaches, mild drop foot on the left side, twitching and cramps in his left leg, pain in his left arch when tired, sluggish legs, a pins and needles sensation and face drooping on the left side. Dr. McQueen saw no objective signs of these complaints. In July 2000, Mr. Einboden complained of right shoulder pain and a month later told Dr. McQueen he was drinking two or three drinks per day, which was a concern to Dr. McQueen. In April 2001, Mr. Einboden complained of slight left chest pain and a crease in the tissue of his left chest which Dr. McQueen does not recall observing and did not record.
- [22] Dr. McQueen testified that for avascular necrosis to develop a significant injury such as fracture of a leg bone or dislocation, use of steroids or excessive alcohol use would be required. He said injuries significant enough to cause avascular necrosis would cause significant pain. Dr. McQueen said that osteoarthritis does not lead to avascular necrosis, but avascular necrosis could lead to osteoarthritis. Another doctor, Dr. Filbey, disagreed with this opinion.
- [23] Ms. Einboden put a long list of Mr. Einboden's post-accident complaints, set out below, to Dr. McQueen and, other than the left hip complaint, Dr. McQueen said that Mr. Einboden had not complained to him of similar symptoms prior to the accident.
- [24] Mr. Einboden testified that he had experienced most, if not all, of the following symptoms:
- a white hot burning in his spine;
 - a white hot burning at the base of his skull;
 - white hot burning at the level of the top of his fears;
 - severe snapping of his neck;
 - vomiting with almost every snap of his neck;
 - feeling of a severe broken right wrist;
 - pain in his right jaw and teeth and being unable to chew;

- stabbing and electric shock pain from the back of his head over the top of his head and a stabbing pain in his eyes;
- three stabbing knives in the back at C5/6, T4/5, and T8/9 discs;
- tenderness over the left rib cage under the left rib;
- soft tissue damage left rib cage;
- severe pain or pressure like a 240 pound person with their knee between his shoulder blades and the other knee on his right hip;
- someone pushing on the back of his skull with a hockey stick;
- blurred vision such that his dinner plate was blurry when sitting down for dinner;
- discomfort such that it was uncomfortable to sit at the dinner table or play games;
- pain such that it was too painful to sit on the edge of the pool or the hot tub;
- sweating on the left side of the body when lying on the right side;
- sweating on the right side of the body when lying on the left side;
- loss of all feeling in both arms and legs when lying in a specific position on his back;
- inability to bear weight on his left leg;
- erectile dysfunction; and
- blacking out at the computer while in a sitting position.

[25] Dr. McQueen saw Mr. Einboden once three days after the accident. He described Mr. Einboden as somewhat tearful when talking about his complaints, which included tenderness in his neck, upper back and lower back. He said Mr. Einboden had a normal range of neck and back movement but was slow and guarded in those movements, with complaints of pain. Dr. McQueen did not record any complaint by Mr. Einboden regarding his left hip on this visit, nor did his chart entry after the accident mention a complaint of vomiting.

[26] Dr. Marcus, a chiropractor consulted by Mr. Einboden between 1996 and 2002, gave evidence, similar to Dr. McQueen, to the effect that Mr. Einboden had not complained to him about the above list of conditions presented by Ms. Einboden after the accident.

Dr. Filbey

[27] The first written medical opinion tendered in evidence was that of Dr. Filbey, a physiatrist or physical medicine rehabilitation specialist. Dr. Filbey examined Mr. Einboden on December 13, 2006, four years and four months after the accident. He was provided with clinical records relating to Mr. Einboden, most of which were created after the accident.

- [28] Dr. Filbey diagnosed neck pain, occipital neuralgia, spondylolisthesis, foraminal encroachment, and myofascial/musculoligamentous muscular pain. He also diagnosed axial skeleton pain: myofascial/musculoligamentous pain. Additionally, Dr. Filbey found left chest wall pain in the T9 - T10 level, right wrist soft tissue pain, right shoulder pain, left hip pain which he said stemmed from osteoarthritis, left knee pain from a kneecap pain disorder, and nausea and vomiting. Of these, he concluded that the occipital neuralgia was the result of the accident; spondylosis predated the accident but its symptoms were aggravated by it; the foraminal encroachment predated the accident but became symptomatic after the accident; and the myofascial/musculoligamentous muscular pain predated the accident but was aggravated or its symptomology increased after the accident.
- [29] It was also Dr. Filbey's opinion that the axial skeleton pain was secondary to the accident; the left chest wall pain either predated the accident or was unrelated to the accident; the right wrist pain resulted from the accident, an opinion that was based entirely on information supplied by Mr. Einboden; and the mild subacromial bursitis causing right shoulder pain was related to the accident but some component of neurological disorder was unrelated to the accident. Dr. Filbey concluded that the left hip pain was caused by osteoarthritis that predated the accident but was rendered symptomatic by the accident based on Mr. Einboden's report of immediate hip pain. He said Mr. Einboden's left knee pain was secondary to a change in the exercise level and gait caused by the pain in the left hip. In Dr. Filbey's opinion. The vomiting and nausea described by Mr. Einboden as having occurred after the accident was something that he was unable to give an opinion on other than as being a somatic reaction or effect of pain.
- [30] In Dr. Filbey's opinion the absence of contemporaneous records of left hip complaint, including on Mr. Einboden's visit to Dr. McQueen three days after the accident, calls into question a causal relationship between the left hip pain and the accident.
- [31] In addition to his written report, Dr. Filbey testified. He said more than once that the severity of an impact or the amount of vehicle damage did not have any clear or direct correlation with injuries, pain or symptoms following a collision. He said that head trauma does not need to occur to cause a concussion. As for any relationship between pre-and-post-accident conditions or complaints, Dr. Filbey said this in cross-examination:
- I think there is - you know, there is no question that this gentleman had pre-existing symptoms. They were affecting his life to the point where he wasn't able to work. He had a car accident. He had some increased symptoms afterwards. That's the story. And I certainly agree with that. I can't give you a percentage change, however, from these records to my own records. Certainly he had symptoms in these areas prior to the accident. There is no question about that.
- [32] This statement should be considered in light of the evidence that Mr. Einboden was able to work before the accident, at the puzzle business and Amway, he just was not succeeding.

- [33] Dr. Filbey testified that avascular necrosis was caused by interruption of blood flow to the head of the femur. He said it could be caused by bone fracture, hip dislocation, alcoholism, or steroid use. He testified that avascular necrosis would not be caused by a mild contusion to the hip joint, and that the accident did not cause avascular necrosis in Mr. Einboden's left hip.
- [34] Dr. Filbey testified that he was very certain that Mr. Einboden had degenerative arthritis in his left hip before the accident. His review of X-rays taken in 2005 led him to characterize the extent of the arthritis as moderate to severe. He testified that the accident had an impact on the development of Mr. Einboden's avascular necrosis, by making the hip joint more susceptible. He said this was secondary to the key issues - which I took to mean causes of the necrosis - which were Mr. Einboden's alcohol intake and the steroid treatments he understood were given him after the accident. He said it was difficult to tease out the extent to which the accident impacted Mr. Einboden's hip condition. He summarized by saying the avascular necrosis resulted from the severely arthritic condition of the hip joint and Mr. Einboden's alcohol consumption.
- [35] Some of Dr. Filbey's opinion was based on acceptance of what Mr. Einboden told him in December 2006; namely, that Mr. Einboden had hip pain immediately after the accident that was severe enough to limit his walking and his function. This is not borne out by Dr. McQueen's chart notes arising from Mr. Einboden's visit three days after the accident, and there are no contemporaneous records showing left hip complaints for the first two or three years after the accident.
- [36] In his written opinion, Dr. Filbey recommends that Mr. Einboden be referred to a chronic pain clinic, although he does not diagnose a chronic pain syndrome or disorder, nor does he either elaborate on this recommendation or give reasons for it.

Dr. O'Breasail

- [37] The day after Dr. Filbey's examination, Mr. Einboden saw Dr. O'Breasail, a psychiatrist. In Dr. O'Breasail's opinion, Mr. Einboden was suffering from a chronic pain disorder secondary to the August 2002 accident. Although he does not directly controvert a pre-accident diagnosis of bipolar disorder, Dr. O'Breasail appears disinclined in his written opinion to agree with that diagnosis, saying that Mr. Einboden may instead have had a bipolar II disorder, characterized by recurrent depressive episodes and mild hypomanic episodes. At trial, Dr. O'Breasail went further to say that he questioned the bipolar diagnosis because he did not believe that Mr. Einboden had had pure manic episodes in the past, and they are a necessary feature of bipolar disorder. Dr. O'Breasail thought it possible that Mr. Einboden had in the past exhibited signs of bipolar 2 disorder, characterized by depression with rare hypomanic episodes.

- [38] Dr. O'Breasail defined chronic pain as pain in a specific anatomical site that lasts for a set period, usually six months. He testified that the pain can be primarily physical in origin, or a combination of physical and psychological origins, or primarily psychological in origin. He testified that while it was theoretically possible to have chronic pain disorder with physical pain alone, it was unlikely that there would be no psychological component in a chronic pain disorder, a circumstance he described as very rare. In cross-examination, Dr. O'Breasail agreed that the Diagnostic and Statistical Manual of Mental Disorders (DSM-4) had been replaced by DSM-5 since his examination of Mr. Einboden, and that the newer version included a diagnosis of Somatic Symptom Disorder. He said that disorder was likely present in 2006, when he examined Mr. Einboden.
- [39] In Dr. O'Breasail's opinion, Mr. Einboden was totally disabled and unable to work when he saw him in December 2006, with a poor prognosis.

Dr. McLeod

- [40] Dr. McLeod is a psychiatrist who saw Mr. Einboden at the Affective Disorders Clinic on a referral from Dr. McQueen, in 1998. Dr. McLeod was called by the defendant to testify from the Clinic's records about his observation of Mr. Einboden, what Mr. Einboden had said to him, and any treatment he had prescribed. He testified that in exploring a diagnosis of mood disorder, the main mood problems considered are depression and bipolar disorder. Bipolar disorder involves depression and manic episodes on opposite ends of a mood scale. Dr. McLeod testified that in 1998 Mr. Einboden's description of his mood in 1990 suggested hypomania, which is less intense than full-blown mania. He said that when one is hypomanic one overestimates one's ability, well-being and capacity. He distinguished between hypomania and a Type A personality by saying that a Type A personality would not have the level of euphoria and grandiose assessment of self that is characteristic of hypomania. Dr. McLeod's records showed that Mr. Einboden was prescribed Prozac in 1994, and Dr. McLeod said that Prozac could induce a hypomanic state.
- [41] Dr. McLeod testified that in 1998 Mr. Einboden told him that there had been a depressive change to his mood and that he was taking occasional medications for anxiety. Dr. McLeod said that Mr. Einboden described an over-energized condition that he had experienced in 1990, and described to Dr. McLeod a history that suggested he had been mostly depressed through the 1990's but once or more each month would be over active and over energized. Dr. McLeod testified that Mr. Einboden described a "pretty significant hypomanic episode" in the spring of 1998. Dr. McLeod recommended that Mr. Einboden take medications commonly used to treat bipolar mood disorder.
- [42] In 2000, Mr. Einboden returned to the Affective Disorders Clinic where he saw Dr. McLeod again. Mr. Einboden described to Dr. McLeod conflicts that he was having with the Canada Customs and Revenue Agency as well as health challenges facing his wife and daughter. Mr. Einboden complained to Dr. McLeod about the following: anger, feeling somewhat down, broken sleep, lacking energy, concentration difficulties, thinking clearly at times and being

"out of it" at other times, feeling depressed sometimes, feeling normal sometimes, and feeling perhaps slightly elevated in mood at other times. Dr. McLeod testified that taking Prozac, prescribed to Mr. Einboden for depression, could possibly have caused manic or hypomanic episodes after 1994 when it was first prescribed for Mr. Einboden.

Dr. Solomons

[43] Dr. Solomons is a psychiatrist who examined Mr. Einboden on April 16, 2019, seventeen years after the accident. In his report he recited at great length from clinical records, most of which are not in evidence. While an expert is entitled to refer to information they consider reliable and necessary to their opinion, that does not make that information admissible for its truth. In his report, in the section titled psychiatric sequelae, Dr. Solomons says that Mr. Einboden's documented history of emotional and psychiatric difficulties included uncertain diagnoses of bipolar disorder type 1 and depression.

[44] Dr. Solomons says:

He told me that his emotional issues after this accident have included anger and frustration and, to some degree, an inability to experience emotions, leading him to feeling detached from his experiences. I note that there are occasional references to anger and frustration in his clinical records after this accident, as there were before the accident, with no indication of clinical worsening after the accident.

[45] What Dr. Solomons called the lack of clinical worsening or change after the accident is controverted by the evidence of Mr. Einboden's wife and children, and his friend Mr. Black, which I summarize below.

[46] In his report Dr. Solomons says:

In the absence of a corresponding history documented in his records and reported at this assessment, it is my opinion that he did not develop a psychiatric disorder, specifically not a mood or anxiety disorder, in relation to this accident and that he has not been psychiatrically impaired by this accident.

[47] Dr. Solomons continues:

The most striking feature of his presentation at this assessment related to his personality style, which is prominently narcissistic, and it is quite possible that he has a long-standing narcissistic personality disorder. His long history of conflicts, difficulties and stresses before and since this accident can be plausibly explained on the basis of this personality disorder.

[48] "[Q]uite possible" falls short of an opinion or diagnosis.

[49] Dr. Solomons does not refer to Dr. O'Breasail's diagnosis of Chronic Pain Disorder, although he had a copy of Dr. O'Breasail's January 4, 2007 report.

Drs. Lad and Meusel

- [50] Dr. Lad and Dr. Meusel are psychologists registered in the province of Ontario in the area of clinical neuropsychology. Dr. Lad is also registered in the area of clinical psychology. They co-authored a report dated January 31, 2020 and marked Exhibit 37, and presumably to avoid an objection based on it being a joint or corporate opinion, both were tendered for cross-examination. Counsel for the defendant cross-examined Dr. Lad while Dr. Meusel was excused. Their opinion was based partly on the results of tests performed on Mr. Einboden, and partly on information they gleaned from interviews of Mr. Einboden, Ms. Einboden, Paige Einboden and Ty-Kennedy Einboden. They concluded that Mr. Einboden appeared to meet DSM- 5 diagnostic criteria for: "somatic symptom disorder, with predominant pain, persistent, severe"; "major depressive disorder, recurrent, severe, with anxious distress"; "alcohol use disorder; and "opioid use disorder".
- [51] With respect to somatic symptom disorder they indicate that there is some indication this may have been present before the accident, however the pre-existing pattern of somatic focus and complaints of pain was clearly exacerbated by the accident. It is not clear on the evidence what if any relationship there may be between chronic pain disorder and somatic symptom disorder, although Dr. O'Breasail testified that Mr. Einboden likely met the criteria for the latter when he saw him in 2006.
- [52] With respect to major depressive disorder they observed that bipolar disorder remains to be ruled out as a diagnosis.
- [53] Dr. Lad and Dr. Meusel say that Mr. Einboden's presentation does not meet the criteria for mild neurocognitive disorder due to traumatic brain injury but that there are subjective cognitive issues that have resulted in a reduced level of functioning since the accident. As to the future they say:

Prognosis is poor given the severity and persistence of his symptoms, as well as his complex medical and mental health history, ongoing concerns around alcohol and opioid use, and multiple ongoing stressors (EG lawsuits, dispute with revenue Canada, etc.). Mr. Einboden is not considered capable of working in any capacity now and into the future. He requires and would likely benefit from ongoing psychological support combined with behaviour therapy and occupational therapy focused on behavioural activation strategies and pain management education. Marital and family counselling and counselling on alcohol and drug overuse would also be beneficial. Finally, ongoing psychiatric support is also required, and a medication review may be warranted.

Dr. Baird

- [54] Dr. Baird is a chiropractor who practices in Ontario. His opinion was based on interpretation of X-rays he either took or commissioned and his review of previous imaging assessments done by others. It did not add much, other than to confirm that in his opinion there was some radiographic support for a complaint of instability in the cervical spine.

Dr. Haney

- [55] Dr. Haney is an optometrist whose examinations of Mr. Einboden led her to say that Mr. Einboden had visual field constriction consistent with a previous concussion. This opinion, coming some eighteen years after the accident, and the equivocal evidence that the accident caused a concussion, has no impact on the overall effect of the medical evidence.

Use of Medical Records

- [56] When the trial resumed in 2021, Mr. Einboden's replaced left hip had become problematic to such an extent that it had to be removed. Mr. Einboden attended trial with a temporary spacer in his left upper leg, and was scheduled for hip reconstruction surgery shortly after the trial.
- [57] Both parties faced significant hurdles in respect of the medical evidence: the plaintiff in proving his case without a consistent contemporaneous chain of medical records or opinion; and the defendant in marshaling medical opinions in the absence of that chain.
- [58] The defendant relies on medical opinions that in turn rely on medical information generated in the ten years or so before the accident. For example, Dr. Moll, a neurologist who examined the plaintiff at the request of the defendant, had recourse to medical information generated by the following: Dr. Martin (neurologist); Dr. Hern (psychologist); Dr. Parton (neurologist); Dr. Marcus (chiropractor), in addition to records of Dr. McQueen and Dr. MacLeod, both of whom testified at the trial.
- [59] None of the clinical records summarized by Dr. Moll are in evidence. While Dr. Moll is also entitled to rely on information he considers reliable and necessary to enable him to reach an opinion, until properly proven such information simply remains assumptions upon which his opinion is based. The weight accorded to the opinion is affected by whether the assumptions have been properly proven.
- [60] In this case, it is important to bear in mind the use to which the parties or the court may put medical or clinical records. This question was thoroughly canvassed in *Edmondson v. Payer*, 2011 BCSC 118, appeal dismissed 2012 BCCA 114. At paras. 23-39 Smith J. said:

[23] Much of the defendant's submission on the plaintiff's credibility flows from what is, or is not, found in the clinical records of doctors the plaintiff has seen. It is therefore important to review the limited purposes for which clinical records are admissible. It is easy to lose sight of those limitations in cases of this kind, where the time spent parsing a single note made by a doctor often far exceeds the length of the medical appointment that the note records.

[24] Clinical records may be admissible as business records pursuant to s. 42 (2) of the Evidence Act, R.S.B.C. 1996, c. 124 [Evidence Act], which reads:

- (2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if
 - (a) the document was made or kept in the usual and ordinary course of business, and
 - (b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.

[25] In *Olynyk v. Yeo* (1988), 55 D.L.R. (4th) 294, 33 B.C.L.R. (2d) 247 [Olynyk cited to D.L.R.], the Court of Appeal said at 300:

The words "to record in that document a statement of the fact" mean, in our opinion, that the fact occurred within the observation of someone who has a duty himself to record it or to communicate it to someone else to record as part of the usual and ordinary course of business.

[26] Section 42 of the Evidence Act therefore makes records admissible to prove such things as a doctor's direct observations of the patient's medical condition, the results of tests performed or ordered by the doctor, and the medical advice given. It eliminates the need for doctors to give oral evidence of those facts, of which they are unlikely to have independent recollection. But as the court noted in *Olynyk*, this "does not make everything in a document admissible just because the document is one which for some purposes falls within the section.": at 301.

[27] The principles governing the admissibility and use of clinical records (and business records generally) were summarized by Burnyeat J. in *McTavish v. MacGillivray* (1997), 38 B.C.L.R. (3d) 306 at 311-12 (S.C.):

1. The notes taken must be made contemporaneously.
2. The notes must be made by someone having a personal knowledge of the matters being recorded.
3. The notes must be made by someone who has a duty himself or herself to record the notes or to communicate the notes to someone else to record as part of the usual and ordinary course of their business.

4. The matters which are being recorded must be of the kind that would ordinarily be recorded in the usual and ordinary course of that business.
 5. A statement in the records of the fact that a certain diagnosis was made will be admissible.
 6. Recorded observations, diagnosis and opinions will be admissible providing they are recorded in accordance with points 1 through 4.
 7. The fact that the referring doctor relied upon another doctor's opinion to assist in coming to his or her own diagnosis and opinion is only evidence of that fact so that the other opinion does not become evidence unless it is otherwise admissible. Accordingly, it is only evidence of the fact that the referring doctor wished or required that opinion to be received before forming his or her own opinion.
 8. Statements made by parties or by experts which are recorded in the usual and ordinary course of business but which lie outside the exception to the hearsay rule are hearsay and will not be admitted into evidence unless they can be brought within Section 14 of the Evidence Act which allows for the admissibility of such statements if it can be shown that they are proof of a prior inconsistent statement.
- [28] The last point refers to the procedure for cross-examining a witness on a prior inconsistent statement. Section 14 of the Evidence Act reads:
- (1) Subject to subsection (2), if a witness, in cross examination as to a former statement made by the witness relative to the subject matter of the proceedings and inconsistent with the present testimony of the witness, does not distinctly admit to making the statement, proof may be given that the witness did in fact make that statement.
 - (2) Before giving the proof referred to in subsection (1),
 - (a) the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and
 - (b) the witness must be asked whether or not the witness made the statement.
- [29] Portions of clinical records that report statements made by the plaintiff, including the plaintiff's description of symptoms, are therefore evidence of the fact the plaintiff made the recorded statements on those occasions. Where the recorded statements are inconsistent with the plaintiff's evidence at trial, they may be used in cross-examination to impeach the plaintiff's credibility.
- [30] Unlike prior inconsistent statements of an ordinary witness, which may only be used to impeach credibility, prior inconsistent statements of a party may also be treated as admissions and accepted for the truth of their content. However, there are important qualifications that apply to such statements in clinical records, whichever purpose they are being used for.

[31] In *Diack v. Bardsley* (1983), 46 B.C.L.R. 240, 25 C.C.L.T. 159 (S.C.) [cited to B.C.L.R.], aff'd (1984), 31 C.C.L.T. 308 (C.A.), McEachern C.J.S.C., as he then was, referred to differences between the evidence of a party at trial and what was said by that party on examination for discovery, at 247:

... I wish to say that I place absolutely no reliance upon the minor variations between the defendant's discovery and his evidence. Lawyers tend to pounce upon these semantical differences but their usefulness is limited because witnesses seldom speak with much precision at discovery, and they are understandably surprised when they find lawyers placing so much stress on precise words spoken on previous occasions.

[32] That observation applies with even greater force to statements in clinical records, which are usually not, and are not intended to be, a verbatim record of everything that was said. They are usually a brief summary or paraphrase, reflecting the information that the doctor considered most pertinent to the medical advice or treatment being sought on that day. There is no record of the questions that elicited the recorded statements.

[33] When statements of a party are relied on for the truth of their content, the authors of *Sopinka, Lederman & Bryant, The Law of Evidence in Canada*, 3d ed. (Markham, ON: LexisNexis Canada, 2009) point out at paragraph 6.398 that one rationale for the admissibility of such statements is that "it is always open to the party to take the witness box and testify either that he or she never made that admission or to qualify it in some other way." The authors also emphasize at paragraph 6.413, that the whole of a statement must be put into evidence:

Thus, if an admission contains statements both adverse and favourable to a party and if an opponent tenders it, he or she may thereby be adducing evidence both helpful and damaging to his or her cause.

[34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.

[35] Further difficulties arise when a number of clinical records made over a lengthy period are being considered. Inconsistencies are almost inevitable because few people, when asked to describe their condition on numerous occasions, will use exactly the same words or emphasis each time. As Parrett J. said in *Burke-Pietramala v. Samad*, 2004 BCSC 470, at paragraph 104:

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

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

[37] The same applies to a complete absence of a clinical record. Except in severe or catastrophic cases, the injury at issue is not the only thing of consequence in the plaintiff's life. There certainly may be cases where a plaintiff's description of his or her symptoms is clearly inconsistent with a failure to seek medical attention, permitting the court to draw adverse conclusions about the plaintiff's credibility. But a plaintiff whose condition neither deteriorates nor improves is not obliged to constantly bother busy doctors with reports that nothing has changed, particularly if the plaintiff has no reason to expect the doctors will be able to offer any new or different treatment. Similarly, a plaintiff who seeks medical attention for unrelated conditions is not obliged to recount the history of the accident and resulting injury to a doctor who is not being asked to treat that injury and has no reason to be interested in it.

[38] The introduction of clinical records cannot be used to circumvent the requirements governing expert opinion evidence set out in Rule 11-6 of the Supreme Court Civil Rules, B.C. Reg. 168/ 2009 [Rules]. A medical diagnosis—and the reasoning that led to the diagnosis—is a matter of expert opinion. Clinical records are admissible for the fact that a diagnosis was made, but the court cannot accept the diagnosis as correct in the absence of proper opinion evidence to that effect. Depending on the facts and issues in a particular case, the mere fact that a diagnosis was made may or may not be relevant.

[39] Clinical records may provide the assumed facts on which an expert may offer an opinion, including diagnosis. For example, statements made by the plaintiff and recorded in clinical records at various times may be relied on by a defence expert in concluding that the plaintiff's current symptoms are the result of a condition that pre-dated the accident. That does not mean that the court can itself use clinical records to arrive at a medical diagnosis in the absence of expert opinion.

[61] There is little in the way of medical opinion from doctors consulted by Mr. Einboden in Florida. He and Ms. Einboden explain this by saying that when the family moved to Florida they had to get temporary medical insurance because there was a two-year qualification requirement for Blue Cross/Blue Shield and the family did not have enough money to pay a

doctor privately. When the family got medical coverage from Blue Cross/Blue Shield, it excluded treatment for neck and back injuries and additionally, many doctors refused to treat him when they found out that his problems or complaints stemmed from a motor vehicle accident.

- [62] I accept this explanation and find nothing sinister in the gap in medical evidence, but that does little to aid Mr. Einboden to prove his case.

Leisure and Family Activities

- [63] Mr. Einboden testified that his leisure activities in the years immediately before the accident included squash, badminton, bowling, karate, helping his two older children, Paige and Bryce with their activities. He often took his children to school, helped Paige with her paper route, took her to horseback riding lessons and ice skating, and played basketball and ball hockey with Bryce, with whom he also went bike riding. Mr. Einboden testified that he went to the gym regularly and as well 3 to 5 times a week he used exercise equipment in the basement of his home, including a punching bag. He testified that shortly before the accident he was able to do one thousand push-ups in a 24-hour period.

Ms. Einboden

- [64] Ms. Einboden testified that Mr. Einboden had been very involved with his family, particularly the children, before the accident but that changed markedly after the accident. She described activities Mr. Einboden did not participate in after the accident that she believed he would have engaged in before the accident.
- [65] Ms. Einboden described frequent vomiting after the accident, occurring during the day and night. This is something Mr. Einboden also described, saying it started the day after the accident, and occurred when he moved his head, or his neck cracked.
- [66] This vomiting - emesis to the medical profession - is something Dr. Filbey was at a loss to explain other than to say it could be a somatic reaction to, or an effect of, pain. Although Dr. Solomons referred to reports of frequent vomiting, he does not attempt to explain it, other than to say it was not consistent with mild traumatic brain injury. Dr. O'Breasail was aware of some vomiting, but apparently not to the extent described by Mr. and Ms. Einboden at trial. Vomiting does not appear to have been important to Dr. O'Breasail's opinion.
- [67] Both Mr. and Ms. Einboden testified that when they formed the plan to move to Florida, they intended for Mr. Einboden to build a house. When they had trouble finding a house large enough to accommodate their family upon their arrival in Florida, they planned for Mr. Einboden to renovate the most suitable house they managed to find to make it livable for a family of five. Both testified that Mr. Einboden was unable to do the work required to renovate the house they purchased when they moved to Florida or build a new house on a lot they bought for that purpose. Both testified that they had to hire others to do work Mr. Einboden would have been capable of doing before the accident.

The Children

- [68] Paige Einboden is the oldest of three Einboden children. She was 12 years old at the time of the accident. She testified that before the accident she had a very good relationship with Mr. Einboden who she described as a very loving and gentle person. Paige Einboden testified that her father took her to and from school, took her camping, built a playhouse in the back yard, taught her how to ride a bicycle, taught her how to skate, helped her with her paper route, encouraged her to take horseback riding lessons and helped her with the horses, among other things. Paige Einboden testified that her father changed immediately after the accident, that he became angry with her and went from being her hero to someone she feared. She described being embarrassed when her father would exhibit pain behaviours or talked to strangers about his accident. She said that Mr. Einboden often raised his voice and said demeaning things.
- [69] Paige Einboden testified that when the family moved to Florida she was nervous about bringing her new friends over to her house because of her father. She did not want her father to drive her friends home from her house because she feared that if something were to happen he would be found to have drugs and/or alcohol in his system. Paige Einboden testified that after the accident she spent a lot of time in her bedroom with the door locked because she was afraid of her father.
- [70] Where before Mr. Einboden was involved with his daughter's school and schooling, she testified that after the accident it was never clear whether her father would come to a school event such as one of her band performances or if he did what condition he would be in or whether he would be on time. Where before the accident her father had helped her with her math homework, after the accident he would mix numbers up and be no help at all. Paige Einboden was concerned about Mr. Einboden's consumption of alcohol and medications to the point of being reluctant to have him pick her up from church on Friday night.
- [71] Paige Einboden testified that before the accident while living in Victoria she saw that her father had many friends and often socialized with other families or business associates, several of whom she named. She described a large party at the Einboden home just before the move to Florida, saying there were perhaps 70 guests and that her father was very involved in setting the party up and participating in the party itself. She testified that after the accident her father had no social life that she could observe.
- [72] Paige Einboden said that her parents appeared affectionate and showed affection toward each other before the accident, and that their relationship seemed to her to be compatible and loving. She said that she had not seen any sign of affection between her parents after the accident, and that they argued often.
- [73] Paige Einboden testified that her father was particularly demeaning and critical of work done by her brother Ty-Kennedy, the youngest of the three children.

- [74] Paige Einboden described her father as "Mr. Mom" before the accident, taking initiative on household chores, participating fully in meal preparation, taking care of her and Bryce Einboden while their mother was hospitalized for several weeks leading up to the birth of Ty-Kennedy. She testified that after the accident, if her father made dinner he would not sit with the family while they ate it and if he made an effort to sit at the dinner table, he often fell asleep. She testified that before the accident her father was a casual drinker, but not to the point of intoxication, and she recalls no drug use before the accident; in contrast, she said that her father's drug and alcohol use was constant after the accident, and she recalled that he poured some sort of alcohol into his morning coffee. Paige Einboden testified that whereas before the accident her father would have supervised her brothers, after the accident that task fell to her.
- [75] Bryce Einboden, the middle child, testified that his father played basketball with him, drove him to school, and helped him with his homework before the accident. He said that Mr. Einboden would spend time outdoors with the family, and described the same party as Paige Einboden, saying that this party was one of his last good memories of his father socializing. Bryce Einboden said that his father did all the heavy work in preparation for the move of family possessions from their house into storage while the family travelled to Florida, whereas when his father arrived in Florida after the accident he was unable to move boxes in the unloading process.
- [76] Bryce Einboden testified that his father was very different in Florida after the accident than he had been before the accident; his father no longer participated in housecleaning, and when he tried to cook he would fall asleep. Bryce Einboden testified that he took over mowing the lawn and that he and his siblings took over the housecleaning, as his mother was working. Bryce Einboden testified that if he relied on his father, for instance to get him to school, he was often late, or if he depended on his father to help with a school project - and he described one - it took too long to complete. He said that if he asked his father for help with his homework his father would fall asleep or would be drunk.
- [77] Bryce Einboden testified that his father would ramble if asked a question so he stopped asking questions and that he was often late for sporting events if he depended on his father to drive him. Bryce Einboden said that there was a lot of yelling and arguing from his father after the accident and that if his father thought he had missed something, or done something inadequately, he would be required to do push-ups or his father would slap him on the head. Bryce Einboden described several occasions in which his father was drunk to the point of passing out. Bryce Einboden described his father's relationship with his sister Paige, saying that after the accident Paige was either not around or if she were home she would be crying in her room and that when his father was present he would be drunk and yell. Bryce Einboden said that his younger brother, Ty-Kennedy took the brunt of his father's abuse, that it seemed that his younger brother could never do anything to satisfy Mr. Einboden.

- [78] Bryce Einboden testified that when the family moved from Florida to Ontario his father was very little help, and that the rest of the family had to do the packing and loading and deal with customs documents.
- [79] Ty-Kennedy Einboden is the plaintiff's youngest child. He said his siblings, not his father, taught him things like how to ride a bicycle, or play basketball. He said his father was either drinking or sleeping while he was growing up, that his father yelled a lot, and nothing he did seemed good enough to his father. As he got older, Ty-Kennedy spent as much time away from home as he could, staying at friends' homes. He said it seemed his father could not think about more than one thing at a time and had trouble staying awake during the day.

Nathan Black

- [80] Nathan Black, whose vehicle Mr. Einboden was driving at the time of the accident, testified that he had known Mr. Einboden since 1994. Mr. Black considered Mr. Einboden to be both a friend and a mentor. Mr. Black described Mr. Einboden as a very active man before the accident. Mr. Black socialized with the Einbodens frequently and described Mr. Einboden playing road hockey, catch or Frisbee with his children. Mr. Black was a ski instructor and downhill racing coach, as well as being involved in karate, where he represented Canada at the world Shotokan karate championships in 2002.
- [81] Mr. Black testified that he saw Mr. Einboden on a weekly basis, and that part of their contacts involved exercise. Mr. Einboden had a heavy punching bag in his basement as well as gymnasium equipment and Mr. Black said that he and Mr. Einboden worked out together regularly, particularly while Mr. Black was training for his 2002 competition. Mr. Black said that from time to time between 1994 and 2002 he noticed that Mr. Einboden appeared to have some difficulty with his left leg after a workout or something similarly strenuous, but saw no signs of left-sided paresis, or of a manic or depressed state. To the contrary, Mr. Black said that Mr. Einboden was always very positive and encouraging.
- [82] When asked about his observations of Mr. Einboden in the summer of 2001, he said that he saw no signs of bipolar disorder, evidence of difficulty with mental judgement or mental functioning, nor did he hear Mr. Einboden complaining of having pins and needles in his left arm. Mr. Black said that he saw mild shaking of both of Mr. Einboden's arms after a good workout, by which he meant lifting weights. Mr. Black said he never heard Mr. Einboden complain of a temperature difference between his left and right extremities.

Credibility

- [83] In this, as in many claims for damages flowing from personal injuries where there are few objective signs of those injuries, credibility plays an important role. Any assessment of credibility requires consideration of two main components: honesty and reliability. As was said in *Bradshaw v. Stenner*, 2010 BCSC 1398, at paras. 186-7:

- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [Farnya]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)).
- [84] I have no concern that Mr. Einboden has deliberately attempted to deceive the court. I accept that he believes to be true what he has said in evidence. But Mr. Einboden's reliability as a witness is compromised by the fact that the August 2002 accident and what he believes to be its effects on him has become all-consuming as has what he considers a contest with the Insurance Corporation of British Columbia and its counsel. I find that the passage of time has blurred some events for Mr. Einboden, while magnifying others. His descriptions of symptoms beggar belief, such as this passage from his evidence in 2010, in which he described what he felt immediately after the impact:

Q So when you regained consciousness you saw the 20 black ball beside the window. You realized it was 21 the police officer. What else did you notice at that time?

A At that time when I -- I woke up, um, I had a white hot burning in my -- base of my skull, the back of my head, and down through my spine. The burning was from the inside of my spine outward. And my first thought was, "Shit, I hope I didn't break my neck." I had -- the burning was in my spine. It is a burning that cannot be described in words to which we can comprehend. That would be like a pregnant woman describing a pregnancy to -- to myself, a male, and for me to comprehend what it feels like for a baby to drop and -- into that position -- is only words. I cannot

comprehend that and put that into -- into feeling.

The burning in my spine cannot be put into words or feelings that we can -- we can even begin to comprehend. And I have gone through many tests in the military and could describe them, but you cannot comprehend them until you actually go through them. And in that I had this immense burning, um -- my entire body -- nervous system -- pins and needles. Pain throughout my entire body. But the burning at the base of my skull, the back of my head, it cannot even begin to be put into 46 words.

Q And we understand you were in a lot of pain?

A Does -- it's --

Q Then what happened?

A Incomprehensible.

Q You said you stayed in the car. Yes?

A I -- I, um, did a check on myself as I would have done from a combat point of view to -- to analyze the situation. Um, to -- to see if anything else -- if I had any movement in my -- in my lower -- my feet, my hands, basically a self-assessment to see where I was at. A quick example of that would be in -- I had performed a vertical roll manoeuvre in the Tutor at 6,000 feet. I had pulled on(e) G. I blacked out in that aircraft.

I woke up at 18,000 feet. The speedometer does not go down to zero. It pegs at approximately 120. And through that your -- your cognitive -- your -- when you come to you -- you come to first doing a rubber chicken, and then as you come to your -- your hearing and your vision then comes -- comes to. And at that point I had, in fact, put the aircraft at a zero point of acceleration. I was actually starting into a tail slide. A tail slide would then invert the cause and inversion spin in the Tutor, which would be --

THE COURT: Mr. Einboden, I don't really need to know the operation --

THE WITNESS: But in doing --

THE COURT: -- of the Tutor.

THE WITNESS: In doing so I had to do that assessment quickly on myself. I did the same assessment on myself as I had been trained to do through years of -- of military training. And so I did that assessment. And I sat perfectly still with my head against the, um -- um, seat to secure my neck. I had found that the -- the phone had somehow bounced. I usually carry it when I'm in the car. I had it under my leg, and the vibration would have tuned me to a phone call. And I made, um, a phone call. I hit -- I hit redial on it, and I had been talking to Mr. Black. And I had hit redial on that and in that informed Mr. Black - basically, "Nathan, I'm at Elk -- Elk Lake. I've been in an accident." And I was still at that point going in and out of consciousness. Um, I believe I may have made another phone call to 911 once I regained enough vision. And --

- [85] This description must be considered in context, including that Mr. Einboden was taken to hospital the day of the accident where he was examined and released the same day. Also relevant is that Mr. Einboden's ability to understand and respond to questions, whether in chief or cross-examination, was clearly affected at various times and to varying degrees by medications he was taking, or by fatigue, or by a combination of those factors.
- [86] Generally, Mr. Einboden's recollection of his pre-accident health and abilities was tinted by rose-coloured glasses while his recollection of his life over the 19 years since the accident has been tainted by drugs, alcohol and mood disorder. Generally, I find Mr. Einboden to be an unreliable witness, and I have the same concerns about the reliability of Mr. Einboden's reports and statements to the medical witnesses who provided opinions or testified at trial.
- [87] Similarly, Ms. Einboden's evidence requires careful scrutiny. Throughout the trial, she has shown herself to be a strong and intelligent advocate for her husband. She appears equally as consumed as Mr. Einboden by the belief that the accident has caused, directly or indirectly, all of the ills that have befallen the family since August 2002.
- [88] In spite of these reservations about the credibility and reliability of the Einboden's, I find, primarily on the evidence of his children, that Mr. Einboden became a substantially different man after the accident as a direct result of injuries he suffered in the accident. Much, if not most, of that change in personality and behaviour stems from Mr. Einboden's reaction or overreaction to his injuries, and the chronic pain disorder that developed from those injuries. This all acted upon a susceptible personality, which Mr. Einboden's symptoms of anxiety and depression before the accident clearly show he had.

Legal Framework

Liability

- [89] The first step in establishing liability in respect of a motor vehicle accident is for the plaintiff to prove on a balance of probabilities that the defendant driver breached the duty of care owed to the plaintiff: *Plett v. ICBC* (1987), 12 B.C.L.R. (2d) 336 (BCCA).
- [90] Ms. Porter denied liability for the collision in her pleadings, but her testimony made clear that she was solely to blame for the accident. The parties were stopped at a red light. When that light turned green and the traffic started to move, Ms. Porter was distracted and failed to notice that traffic in front of her was slowing causing her to rear end the vehicle Mr. Einboden was driving. Additionally, she has led no evidence and made no argument to counter the logical inference that she breached the duty of care she owed to Mr. Einboden when she collided with the rear of the vehicle he was driving. I find on the evidence before me that Ms. Porter's negligence was the sole cause of the collision.

Causation

[91] The general principles governing causation were set out in *Athey v. Leonati*, [1996] 3 S.C.R. 458 [Athey]:

13 Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, 1990 CanLII 70 (SCC), [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).

14 The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, 1971 CanLII 24 (SCC), [1972] S.C.R. 441.

15 The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: *Myers v. Peel County Board of Education*; 1981 CanLII 27 (SCC), [1981] 2 S.C.R. 21, *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.); *McGhee v. National Coal Board*, *supra*. A contributing factor is material if it falls outside the *de minimis* range: *Bonnington Castings, Ltd. v. Wardlaw*, *supra*; see also *R. v. Pinsky* (1988), 1988 CanLII 3118 (BC CA), 30 B.C.L.R. (2d) 114 (B.C.C.A.), *aff'd* 1989 CanLII 47 (SCC), [1989] 2 S.C.R. 979.

16 In *Snell v. Farrell*, *supra*, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

17 It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (*The Law of Torts* (8th ed. 1992) at p. 193), a "fire ignited in a wastepaper basket is . . . caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

18 This proposition has long been established in the jurisprudence. Lord Reid stated in *McGhee v. National Coal Board*, *supra*, at p. 1010:

It has always been the law that a pursuer succeeds if he can shew that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury.

19 The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm: Fleming, *supra*, at p. 200. It is sufficient if the defendant's negligence was a cause of the harm: *School Division of Assiniboine South, No. 3 v. Greater Winnipeg Gas Co.*, 1971 CanLII 959 (MB CA), [1971] 4 W.W.R. 746 (Man. C.A.), at p. 753, *aff'd* 1973 CanLII 1313 (SCC), [1973] 6 W.W.R. 765 (S.C.C.), [1973] S.C.R. vi; Ken Cooper-Stephenson, *Personal Injury Damages in Canada* (2nd ed. 1996), at p. 748.

20 This position is entrenched in our law and there is no reason at present to depart from it. If the law permitted apportionment between tortious causes and non-tortious causes, a plaintiff could recover 100 percent of his or her loss only when the defendant's negligence was the sole cause of the injuries. Since most events are the result of a complex set of causes, there will frequently be non-tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.

[92] The "thin skull rule" provides that the defendant must take the plaintiff as they find them, even if the plaintiff's injuries are "unexpectedly severe owing to a pre-existing condition" (Athey, para. 34; see also *Blackwater v. Plint*, 2005 SCC 58 [Blackwater] at paras. 78-79).

[93] The "crumbling skull" rule underscores that the defendant need not put the plaintiff in a position better than his original position (Athey, para. 35). This means the defendant is not liable for debilitating effects of pre-existing conditions that the plaintiff would have experienced absent the accident.

[94] Both the thin skull and crumbling skull rule are relevant given the facts of this case and I have conducted my analysis with them in mind.

Findings of Fact

[95] Based on the foregoing, I make the following findings.

[96] I find that the accident was entirely the fault of the defendant Ms. Porter and that the accident caused some injuries to Mr. Einboden.

- [97] The evidence does not establish that the accident caused, aggravated or accelerated either the degeneration of Mr. Einboden's left hip or the avascular necrosis of his left hip, and therefore that his hip replacement surgery in 2010, or the further hip surgeries of 2021 are not something for which the defendant must compensate him. That said, the defendant's negligence caused soft tissue injuries to Mr. Einboden's neck and back and aggravated pre-existing neck and back conditions.
- [98] I also find that before the accident, Mr. Einboden suffered from emotional or mood disorders that included depression and perhaps a mild form of bipolar disorder. These disorders were relatively well controlled at the time of the accident, but Mr. Einboden's pre-existing disorders were aggravated by the accident and the soft tissue injuries he sustained therein.
- [99] I conclude that the pain from Mr. Einboden's accident-related injuries has become chronic, and has led to chronic pain disorder. As a result, Mr. Einboden became habituated to narcotic pain medications that were prescribed for him by his treatment providers in Florida. When he moved back to Canada and his treatment providers refused to prescribe narcotic pain medications, Mr. Einboden elected to obtain and use these controlled substances illegally. The substances in question, OxyContin and/or oxycodone, are controlled substances within the meaning and definitions under the Controlled Drugs and Substances Act, S. C., 1996. I also find that Mr. Einboden has elected to supplement the painkilling benefits of the narcotic pain medications with alcohol, and this is contrary to the weight of the medical advice he has received on that subject.
- [100] The drugs and alcohol, together or separately, are a significant reason Mr. Einboden has had trouble staying awake and engaged over the years, which in turn has contributed to him becoming largely alienated from his wife and family. The contribution of opioid medication to this alienation was fostered by his medical treatment providers in Florida, and to that extent, Mr. Einboden may be excused for following this medical advice, at least initially. That said, I find that the contribution of alcohol to this alienation is entirely Mr. Einboden's responsibility. I also conclude that drug and alcohol abuse also play a large part in explaining some of Mr. Einboden's complaints since the accident, such as nodding off or falling asleep at inconvenient times, or problems of concentration and mentation.
- [101] I find that another major contributor to Mr. Einboden's alienation from his family has been ill humour. His wife and children describe a mean-spirited, nasty, and ill-tempered man since the accident. Ms. Einboden goes so far as to describe her husband as evil. Dr. O'Breasail's opines:

Depression, low frustration tolerance, irritability, and anxiety are very common in individuals suffering from chronic pain. The depression itself is secondary to the presence of the pain and also secondary to the effects the pain has on one's ability to function both vocationally and also in interpersonal relationships. Although this man at the present time does not meet the criteria for a diagnosis of depression, he does suffer from psychological symptoms directly related to his Chronic Pain Disorder.

[102] I accept Dr. O'Breasail's opinion and find that the accident injuries have contributed significantly to Mr. Einboden's change of personality and the family alienation stemming in part from that change.

Damages

[103] An award for damages seeks to put the plaintiff in the position he would have been in but for the defendant's negligence (Blackwater, para. 81). No better, no worse.

[104] While the plaintiff treats past and future medical expenses as discrete heads of damage I will deal with past medical expenses when considering special damages, and future medical expenses when considering the cost of future care.

[105] Before turning to the various heads of damages, I note the BC Court of Appeal's comment in *Gao v. Dietrich*, 2018 BCCA 372 at para. 34 that:

With respect to past facts, the standard of proof is the balance of probabilities. With respect to hypothetical events, both past and future, the standard of proof is a "real and substantial possibility". The standard of a "real and substantial possibility" is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative.

Past Loss of Earning Capacity

[106] The essential purpose of an award for past loss of opportunity and diminished earning capacity is to provide the plaintiff with full compensation for all of her pecuniary losses, subject to rules of remoteness and mitigation: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.

[107] Dr. O'Breasail has said, and I accept, that Mr. Einboden has chronic pain disorder, that this condition totally disables him, and this is unlikely to change.

[108] Mr. Einboden was not employed at the time of the accident. He had ended the puzzle-making business venture some years before the accident.

[109] The Amway business started in 1993 or 1994. Gross revenues from that endeavour peaked in 1997 at \$62,451.68. In that year, the cost of the goods sold was \$46,181.78, for a gross profit of \$16,269.90. Expenses were declared to be \$40,200.96, for a loss of \$23,930.56. Mr. Einboden pointed out that some of those expenses were in fact a benefit to him or his family, and that may be true. He also testified that the Amway business never reached the

point where he or Ms. Einboden could draw a salary. In the absence of a forensic audit or accounting, or some detailed evidence showing that the Amway business generated a net benefit to Mr. Einboden or to his wife in the form of income or earnings, I conclude that the Amway venture was at best building toward profitability before 1998. After that year, it declined steadily because of Mr. Einboden's indiscretion, to the point that at the time of the accident revenues were insignificant and profits non-existent.

- [110] Mr. Einboden's real estate ventures - buying, renovating and reselling houses, had last earned him some money in the early 1990's, ten or so years before the accident. As I have already said, the evidence with respect to the costs associated with any renovations is insufficient to permit an accurate assessment of Mr. Einboden's capacity to earn an income from similar endeavours.
- [111] This aspect of the claim is predicated on the assumption that Mr. Einboden's capacity to earn from building or renovating houses is based on his ability to do most of the physical work himself. I accept that Mr. Einboden's injuries, which include a chronic pain disorder, have prevented him from engaging in heavier construction. I also find that the condition of Mr. Einboden's left hip, which began to manifest itself three years after the accident, would have made such activities progressively more difficult, becoming impossible somewhere between 2005 and 2010.
- [112] Mr. Einboden claims that he has lost the opportunity to make a profit on moving his household effects from Victoria to Florida, and to establish a business patterned after similar moves, as well as a similar but vaguely described enterprise transporting propane. This aspect of the claim is speculative at best.
- [113] I conclude that the accident injuries have contributed a relatively small amount to Mr. Einboden's inability to earn an income since the accident. His left hip problems were more significant between 2005 and, say 2011, then again between 2020 and trial. Notwithstanding that he became addicted to opioids because of medical treatments in Florida, his continued use of opioids contrary to Canadian medical advice and excessive alcohol intake, also contrary to medical advice, contribute to his lack of earnings since the accident.
- [114] Assessment of an impaired opportunity to earn income requires balancing the likelihood that the income would have been earned if not for a tortious event, such as this accident, against an assessment of the amount that would have been earned if not for the tortious event. In this case, the contribution of the accident is relatively small, and the possible income that Mr. Einboden could have earned absent the accident in the years since 2002 is not great, given the evidence of his earnings in the five years or so before the accident.
- [115] I assess the loss of past earning capacity between accident and trial at \$30,000.

Future Loss of Earning Capacity

- [116] An award for loss of future earning capacity acknowledges that "a plaintiff's capacity to earn income is an asset which has been taken away" (*Rosvold v. Dunlop*, 84 BCLR (3d) 158 (BCCA)).
- [117] The BC Court of Appeal has recently clarified the approach to assessing damages for loss of future earning capacity. At para. 47 of *Rab v. Prescott*, 2021 BCCA 345, Grauer J. set out the three-step analysis:
- [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in *Dornan* at paras 93-95.
- [118] The evidence in this case discloses a potential future event that could lead to a loss of capacity: Mr. Einboden's chronic pain disorder and the myriad issues it causes. There is certainly real and substantial possibility that the future event will cause a pecuniary loss because it will interfere with Mr. Einboden's ability to earn income. That said, the future loss in this case is relatively small given Mr. Einboden's pre-existing issues.
- [119] In sum, Mr. Einboden's claim for lost future earning capacity suffer from the same problems as his claim for loss of past earning capacity, with the additional wrinkle that each year he gets older and less competitive in the job market or business world. Mr. Einboden is now 60 years old. He has a high school education, and is trained as a helicopter and fixed wing pilot, although health problems predating and unrelated to the accident stopped him from flying eight or nine years before the accident.
- [120] He is currently scheduled for surgery on his left hip and I do not know what his expected recovery/rehabilitation time might be, assuming surgical success.
- [121] I find that the accident has diminished Mr. Einboden's future earning capacity, but that factors unrelated to the accident, including his pre-accident physical and emotional health and his hip condition, contribute more to his inability to earn an income than the physical or emotional insults caused by the accident.
- [122] I assess \$20,000 for lost future earning capacity.

Loss of Housekeeping Capacity

- [123] A plaintiff may claim for loss of housekeeping capacity even where the services are provided gratuitously by family members and an award for such a loss is an assessment not a precise calculation (*Liu v. Bains*, 2016 BCCA 374, paras. 25-29).
- [124] I accept the evidence of the Einboden family that before the accident Mr. Einboden was primarily responsible for home maintenance, both inside and out. I further accept that when circumstances called for him to take over homemaking tasks such as cooking or cleaning, he did so, and did it well, in spite of any pre-accident mood disorders or other problems. I further accept that he is no longer able to take on such tasks, inside or outside the home, and I find that this inability stems more from his chronic pain disorder, except when his left hip problem would have prevented him from contributing to the housekeeping in any event.
- [125] Further, I find that since 2002 Mr. and Ms. Einboden had planned that Ms. Einboden would work outside the home, and Mr. Einboden would assume primary responsibility for childcare, cooking, cleaning and other housekeeping tasks. That continues to be the case, as the evidence is that Ms. Einboden has developed a business training service dogs, and I conclude that the expectation that Mr. Einboden would continue to do most of the household tasks would have continued.
- [126] I find on the evidence of the family members that this is a real loss, one felt keenly by Mr. Einboden, and I assess \$50,000 to compensate him.

Cost of Future Care

- [127] Cost of future care is not a precise accounting exercise (*Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9). The BC Court of Appeal set out the purpose of such an award in *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351, para. 29:
- The purpose of the award for costs of future care is to restore, as best as possible with a monetary award, the injured person to the position he would have been in had the accident not occurred.
- [128] Justice Weatherill summarized the principles that guide awards for costs of future care in *McHatten v. McCrea*, 2021 BCSC 1471:
- [194] ...Any award should reflect the reasonable or normal expectations of what the plaintiff will require: *Spehar (Guardian ad litem of) v. Beazley*, 2004 BCCA 290 at para. 19, quoting *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 22; *Peters v. Ortner*, 2013 BCSC 1861 at paras. 141-144.
- [195] The plaintiff must demonstrate an evidentiary link between her pain symptoms and the recommended treatment and care: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at paras. 38-40, 44-47; *Gignac* at para. 32.

[196] As summarized in *Sawires v. Paris*, 2021 BCSC 240:

A little common sense should inform claims for costs of future care, however much costs may be recommended by experts in the field: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135, at para. 13. No award is appropriate for costs that a plaintiff would have incurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that the plaintiff will use the suggested services: see *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20.

[129] The plaintiff tendered the opinion and recommendations of Ms. Jewett, an Occupational Therapist, dated December 28, 2006, based on an assessment done on December 12, 2006, as well as Ms. Jewett's review of medical and clinical records from 1996 to 2006. I am unable to determine whether the recommended goods and services are medically justified on the evidence before me, nor can I have confidence that costs that might have been accurate in late 2006 continue to be reliable.

[130] However, the evidence does persuade me that counselling for Mr. Einboden's chronic pain disorder as well as for his damaged family relationships is medically justified. Ms. Jewett recommended \$3,900 per year for psychological counselling, based on the 2006 British Columbia fee schedule price of \$150 per session. Ms. Jewett recommends ongoing counselling. Dr. O'Breasail believed Mr. Einboden would benefit from counselling to help him deal with the changes chronic pain have made in his life.

[131] The present value economist's opinion dated January 5, 2007, related to Ms. Jewett's opinion is too far out of date to be useful. With that in mind, it states that the present value of the recommended counselling at that time was \$75,974. Close to fifteen years have passed. The economic report based future care costs on an assumed life expectancy of 34.5 years as of January 2007, and almost half of that is now past. This is an assessment, not a calculation, and I award \$35,000 for future counselling as cost of future care.

In-Trust Award

[132] The principles governing in-trust awards was succinctly set out by Burke J. in *Popove v Attisha*, 2019 BCSC 1587 :

[57] Claims for household duties and other services rendered by immediate family members are allowable where the plaintiff demonstrates the need for such services as a consequence of the injuries sustained. The plaintiff must satisfy the Court, on a balance of probabilities, that the family member providing the services suffered a direct pecuniary loss (because of the time and effort put into those services) or that the family member's efforts replaced housekeeping expenses that would have otherwise been incurred: *Star v. Ellis*, 2008 BCCA 164 at para. 17.

- [58] The law of in-trust claims is governed by the principles set out in *Bystedt (Guardian ad litem of) v. Bagdan*, 2001 BCSC 1735 (B.C.S.C.) at para. 180, *aff'd* 2004 BCCA 124, where the Court identified the following relevant factors:
- the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
 - if the services are rendered by a family member, they must be over and above what would be expected from the family relationship;
 - the maximum value of such services is the cost of obtaining the services outside the family;
 - where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
 - quantification should reflect the true and reasonable value of the services performed taking into account the time, quality, and nature of those services; and,
 - the family members providing the services need not forgo other income and there need not be payment for the services rendered.
- [59] Cases in which awards have been made for in-trust services involve care provided to seriously injured plaintiffs or support services beyond what might normally be expected in a familial relationship. In assessing the appropriateness of an in-trust claim, standard compassion and care of relatives are not to be compensated. The compensation is for the extra services provided by the family member at a reasonable cost.
- [133] Mr. Einboden claims an in-trust award for nursing care/dressing change provided by Ms. Einboden, but that claim relates to Mr. Einboden's hip surgery, which I have found to be unrelated to the accident. Ms. Einboden attempted to admit evidence of time she spent preparing and presenting Mr. Einboden's claims at trial but failed to establish its relevance. This evidence was not admitted.
- [134] The children testified that they took over tasks such as mowing lawns, house cleaning or putting up Christmas lights. Their evidence was not sufficient to take their services beyond what one might reasonably expect from family members. I make no award for in-trust damages.

Special Damages

- [135] As with the other heads of damages, special damages are justified to help restore the plaintiff to the position he would have been in had the accident not occurred (*Jacobsen v. Nike Canada Ltd.*, 49 B.C.L.R. (2d) 33). They must be both reasonable and necessary, as Chief Justice Hinkson noted in *Grabovac v Fazio*, 2021 BCSC 2362:

- [371] While plaintiffs are entitled to be compensated through special damages for reasonable out-of-pocket expenses incurred as a result of an accident, there must be evidence of medical justification for expenses intended to promote the plaintiff's physical or mental health: *Coulombe v. Morris*, 2021 BCSC 2034 at para. 70; *Healey v. Mault*, 2021 BCSC 2197 at para. 207; *Redl v. Sellin*, 2013 BCSC 581 at para. 55.
- [136] The plaintiff has produced a series of spreadsheets for the years 2002 to 2020, inclusive, showing amounts he claims he paid for medical goods and services. Some of the services are identified, such as chiropractic treatments between September and November 2002, 2014, 2015, 2016, optometrist in 2014, or massage therapist in 2015 and 2020. Some are for goods such as orthotics, and I do not know what orthotics Mr. Einboden purchased, or why they were needed. A significant part of the total is for prescribed drugs, or generic prescribed drugs. A larger portion is for a category labelled "medical services" in the years 2003 through 2012. For some years, the claims are broken down between Blue Cross/Blue Shield, expressed in United States dollars, and Mondial Assistance, expressed in Canadian dollars or, starting in 2012, Allianz Global Assistance, expressed in United States dollars.
- [137] The total medical, drugs and treatment expenses claimed, reflected in exhibit 12 is \$78,863.12.
- [138] I am unable, on the evidence presented, to find what if any portion of these medical expenses are attributable to the progressively degenerating left hip that I have found has not been proven to have been caused or affected by the accident.
- [139] The evidence does persuade me that injuries sustained in the accident, and the chronic pain syndrome that developed, reasonably required medication and treatments such as chiropractic and massage therapies. While claims such as these, for past expenses, are most often approached as a matter of calculation based on receipts and evidence showing why the receipted goods or services were justified, that is not possible on the state of the evidence before me. Instead, I must assess damages to compensate for these losses, and I award \$25,000.
- [140] Mr. Einboden claims \$2,350 that he paid to move the family's belongings to Florida, on the basis that his plan to make money on the move by sub-letting space on a trailer was thwarted by his injuries and he had to pay instead. While I accept that he paid to move the belongings, I am not persuaded that the scheme to avoid this expense has been sufficiently proven such that an expense that would have been incurred in any event should be treated as a compensable expense.
- [141] Mr. Einboden claims for money he paid to others to work on home renovations or construction in Florida, on the basis that but for his accident injuries he would have done the work himself. He has testified that the involvement of a contractor was required in order to obtain mortgage financing. His degenerating hip was the major impediment to his more active participation in these activities. Accident-related conditions contributed to additional costs. It is impossible on the state of the evidence to approach a calculation. In

the circumstances, I award \$10,000 for this aspect of the claim.

[142] In total, I award special damages in the amount of \$35,000.

Non-Pecuniary Damages

[143] Non-pecuniary damages are intended to meet the specific circumstances of the plaintiff before the court. Factors relevant to this analysis were set out by the BC Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 [Stapley] and include:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering;
- (f) loss or impairment of life;
- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism

[144] Mr. Einboden seeks damages at or approaching the upper limit. An award under this head of damage, like the others, must be fair not only to Mr. Einboden but to the defendant as well. Much of what Mr. Einboden has suffered since the accident is related to his left hip problems, and I have found that they were not caused or contributed to by the accident. Some of Mr. Einboden's post-accident problems are aggravation of active or recurring pre-accident conditions, such as depression. Some of Mr. Einboden's post-accident problems are caused in whole or in large part by the accident and injuries suffered in it. The soft tissue neck and back injuries I find are wholly attributable to the accident. The chronic pain syndrome is also caused by the accident.

[145] Assessment of damages in this case requires consideration of what would likely have befallen Mr. Einboden if no accident had occurred as well as whether Ms. Porter's negligent driving was a cause, but not necessarily the only or primary cause, of Mr. Einboden's injuries. See *Blackwater* at paras. 78-81.

[146] In applying the law as set out in *Stapley* and *Athey* my best assessment is that Mr. Einboden's non-pecuniary damages for pain, suffering and loss of enjoyment of life are adequately compensated by damages of \$110,000.

[147] The authorities cited by the defendant on non-pecuniary damages are of little assistance as they do not take into account Mr. Einboden's now-intractable chronic pain syndrome.

Conclusion

[148] In summary, the plaintiff is entitled to judgement against the defendant in the following amounts:

- a) Past loss of earning capacity: \$30,000
- b) Future loss earning capacity: \$20,000
- c) Loss of housekeeping capacity: \$50,000
- d) Cost of future care: \$35,000
- e) Special damages: \$35,000
- f) Non-pecuniary damages: \$110,000

Total: \$280,000

[149] Costs will follow the event unless either party applies for a different order within 30 days of release of this decision.

"The Honourable Mr. Justice Johnston"

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