

CANADA / JUDGMENT

Enns v. Corbett

2020 BCSC 1680

COURT

Supreme Court of British Columbia

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2020 BCSC 1680 Enns v. Corbett

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Enns v. Corbett,

2020 BCSC 1680

Date: 20201109

Docket: M33169

Registry: Chilliwack

Between:

James Andrew David Enns

Plaintiff

And

Jennifer Travis Corbett and Mark Eugene Gaudio

Defendants

Corrected Judgment: The front page of the judgment was corrected on November 16, 2020.

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

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Place and Dates of Trial:

Chilliwack, B.C.

July 20-24, 2020

July 28, 29, 2020

Place and Date of Judgment:

Chilliwack, B.C.

November 9, 2020

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(1) Introduction

- [1] The plaintiff James Enns seeks damages for personal injuries sustained in a motor vehicle collision at the intersection of McClure Road and Gladwin Road in Abbotsford. Mr. Enns was making a left turn at a controlled intersection when his car was "t-boned" by a truck owned by the defendant Mark Gaudio and driven by the defendant Jennifer Corbett. Both liability for the collision and the quantum of damages suffered by Mr. Enns were live issues at trial.

(2) Facts

(2.1) The Collision

- [2] The collision took place on 30 April 2016, just before noon, at the intersection of Gladwin Road and McClure Road in Abbotsford. The weather was clear and the road conditions were good.
- [3] By all accounts, the plaintiff's left-turning red Honda Civic was hit broadside by the defendant's black F-250 pickup truck, traveling straight through the intersection from the opposite direction. Photographs marked in evidence show that the plaintiff's car was impacted in more or less the middle of the passenger side. Both passenger side doors were compressed inward, both passenger side windows were shattered, and the roof was buckled on the passenger side as a result of the impact. With respect to the defendant's truck, the photographs show damage to the front bumper and headlight on the passenger side. All of this is consistent with the conclusion that the defendant's truck t-boned the plaintiff's car.
- [4] There were four witnesses who saw the collision from four different perspectives, one on each of the four sides of the intersection. The plaintiff Mr. Enns was the driver and sole occupant of a red Honda Civic sedan, traveling northbound on Gladwin Road. The plaintiff also called evidence from Ms. Toplass, a passenger in a vehicle facing eastbound on McClure, and Mr. Webb, the driver of a vehicle facing westbound on McClure. Finally, the defendant Ms. Corbett was driving her husband's black Ford F-250 pickup truck, southbound on Gladwin. Because of the differing perspectives and accounts of what happened, it is necessary to review the testimony of each witness in some detail.

(2.1.1) Plaintiff's Testimony Regarding the Collision

- [5] Mr. Enns, the sole occupant in his red Honda Civic sedan, had just picked up some fast food and was on his way back to a baseball diamond where he was participating in a slow-pitch tournament. He was northbound on Gladwin Road, travelling at approximately 50 km/h as he approached the intersection at McClure Road. He saw the light turn yellow just before he reached McClure Road. As he entered the intersection, he shifted from third to second gear, slowing his car in preparation for a left turn. There were some vehicles ahead of him in the intersection, but he could see no oncoming traffic, so he began his left turn onto McClure Road. He did not see the defendant's truck as he began his turn. As he was almost through

his turn, he saw the front grill of the truck as it was about to hit his car. Mr. Enns does not remember the collision itself.

- [6] In cross-examination, Mr. Enns confirmed that he entered the intersection on a yellow light because in his view, it would not have been safe for him to stop. This makes sense given the speed and position of his car as the light changed from green to yellow.
- [7] Counsel questioned Mr. Enns regarding the speed of his car, by reference to a statement attributed to him in his doctor's clinical records, that his car was going 50 km/h at the time of the collision. Mr. Enns did not agree that this is exactly what he said to the doctor. He could not recall the specific question the doctor asked him, or precisely what he said in response. Mr. Enns maintained in his trial testimony that he was not traveling 50 km/h at the time of the collision; rather, he was initially travelling around 50 km/h and he then slowed his vehicle by shifting gears in anticipation of his left turn.
- [8] Mr. Enns denied the suggestion that he cut diagonally across the intersection. He maintained that he slowed his car to the point where he was able to make the left turn at a relatively sharp angle.
- [9] Mr. Enns conceded that he did not see the light turn red. He entered the intersection when the light was yellow, and he was not watching the light after that. He added that he might not have been able to see the light change from yellow to red because by that time he had already driven under the light stand.
- [10] Mr. Enns was challenged on the assertion in his testimony in chief that he could not say what color the light was when the defendant's truck entered the intersection. He was cross-examined on his amended notice of claim, which specifically alleges that the defendant's truck entered the intersection on a red light. Mr. Enns responded that he did not specifically instruct his lawyer to allege this in his pleadings. He maintained that he was unable to see the color of the light when the truck entered the intersection, because he did not see the truck until just before impact.
- [11] Counsel also cross-examined Mr. Enns on an entry in his doctor's clinical records stating that the defendant's truck was travelling 80 km/h at the time of the collision. Mr. Enns allowed that he may have said this to his doctor, but explained that he was relying on the tow truck driver who opined that the truck must have been going 80 km/h based on the vehicle damage. Mr. Enns was unable to say from personal observation how fast the truck was going.
- [12] Mr. Enns maintained that the intersection was clear when he began his left turn onto McClure Road. He did not see the defendant's truck. He said the truck did not pose an immediate hazard. If the truck was an immediate hazard he would have seen it and would have let it go by him before making his turn.

- [13] Mr. Enns was unable to remember what happened after the point of impact. When he came to, his vehicle was stopped on the road facing eastbound. The air bags had deployed and Mr. Enns could see an impression on the driver's side airbag from where his head impacted it. Some bystanders approached and told Mr. Enns to remain in his car until paramedics arrived. Mr. Enns recalls waiting in his car for some time, during which he felt hungry so he started to eat a cheeseburger. There was broken glass from the windshield all around him, and a bystander told him to stop eating, so he did.
- [14] In cross-examination, Mr. Enns denied the suggestion that he did not see the defendant's oncoming truck because he was eating a cheeseburger while driving. He explained that it would have been virtually impossible for him to turn the steering wheel, operate the stick shift manual transmission, and eat a cheeseburger at the same time. He maintained that he only started eating the cheeseburger while waiting in his car for first responders. Mr. Enns also agreed in cross-examination that he may have lost control of his bladder at some point during or after the collision.

(2.1.2) Testimony of Ms. Toplass

- [15] Ms. Toplass was the passenger in a westbound vehicle which was stopped at a red light, behind another vehicle, in the left turn lane on McClure Road. Ms. Toplass was looking down at her phone when the driver in her vehicle made a comment about the truck approaching the intersection from the north. When Ms. Toplass looked up, the light in front of her was showing a green arrow, and the southbound truck was in the intersection. She saw it go by out of the corner of her eye. She heard a loud bang but did not see the actual collision because her view was obstructed by the vehicle in front of her. In cross-examination, Ms. Toplass conceded that she did not see the truck enter the intersection, and she only had sight of it for a second or less before it went out of her view.
- [16] Counsel for the defendants questioned Ms. Toplass about a statement she gave to an insurance adjuster several months after the collision. In that statement, the adjuster invited Ms. Toplass to opine about the causes of the collision. Although the opinion itself was not admissible evidence, I permitted cross-examination on it on the basis that it could elicit evidence as to the factual observations underlying the opinion. The cross-examination did not prove to be fruitful, however, because it became apparent that the opinion Ms. Toplass had given to the adjuster was based more or less entirely on speculation about the conduct of both the plaintiff and the defendant leading up to, during, and after the collision. This is no criticism of Ms. Toplass, who was invited by the investigator to speculate on who caused the collision. Still, the statements Ms. Toplass made to the investigator had no evidentiary value.
- [17] Ms. Toplass testified that after the collision, she approached the red Honda, which came to rest facing eastbound on McClure Road. She saw a lot of damage to the passenger side of the car. She testified that the driver of the red Honda - obviously Mr. Enns - appeared to be in shock and did not appear to be fully aware of what had happened. He said he wanted to get

out of the car, but Ms. Toplass and other bystanders told him not to move until the first responders arrived. Mr. Enns also said he was hungry, and Ms. Toplass noted that there was "food in the car". In cross-examination, Ms. Toplass stated that she saw an unwrapped cheeseburger, but no bites had been taken out of it when she first saw it.

(2.1.3) Testimony of Mr. Webb

- [18] Mr. Webb was the driver of a vehicle facing eastbound on McClure Road. His vehicle was in the centre lane, stopped at the red light. When the light turned green, just as he took his foot off the break, he saw the defendant's black truck coming through the intersection. It was going so fast that it was just a blur. It struck the plaintiff's oncoming left-turning car, which flung into the air on impact. Mr. Webb testified that he probably would have seen the car as it entered the intersection, but does not recall because at that point nothing memorable had happened. Mr. Webb was clear that the light facing him was green when the collision occurred.
- [19] In direct examination, counsel sought to elicit testimony from Mr. Webb regarding the estimated speed of the defendant's truck. I permitted the question on the basis that lay opinion evidence about matters of common experience, such as a person's state of sobriety, height, or weight, or the estimated speed of a moving object may be admitted and given such weight as considered appropriate based on the witness's articulation of the underlying factual observations. However, as it turned out, Mr. Webb's estimate of the truck's speed was based on his observations of the impact and the aftermath of the collision, rather than on his direct observation of the truck as it travelled through the intersection. Accordingly, I give no weight to Mr. Webb's opinion as to the speed of the truck. The most that I can take from his evidence is the general observation that the defendant's truck was going so fast that it was mere a blur to him, keeping in mind that Mr. Webb was in a stationary position relative to the truck as it approached at a more or less perpendicular angle.
- [20] Mr. Webb testified that after the collision, he got out of his vehicle, called 9-1-1, and then approached the driver of the red Honda, that is, Mr. Enns. When he reached the car, he saw that Mr. Enns was eating a cheeseburger. He told Mr. Enns that he should stop eating. On cross-examination, Mr. Webb added that there were lots of people around and he was unable to say whether he was the first person to attend to Mr. Enns.

(2.1.4) Defendant's Testimony

- [21] Ms. Corbett was driving a Ford F-250 pickup truck owned by her partner, the co-defendant Mr. Gaudio. Ms. Corbett drove the truck with some regularity and confirmed that it had no mechanical difficulties. Her teenage daughter was in the front passenger seat. Ms. Corbett testified that she was especially cautious when driving with her daughter, who struggled with anxiety after having been seriously injured in a prior motor vehicle accident.

- [22] Ms. Corbett lives in the area and is familiar with the intersection in question. She explained that McClure Road was basically at the top of a rise in Gladwin Road. As she drove south on Gladwin Road toward the intersection, Ms. Corbett observed that the light had been green for some time, and she was anticipating that it would change to yellow before she reached the intersection, so she took her foot off the accelerator and allowed the truck to slow going up the incline in the road. However, the light did not change by the time she reached the crest of the hill, at which point she accelerated and committed to proceed. She estimated that the truck was going about 30 km/h when it crested the hill, and she accelerated to approximately 40 km/h when she committed to proceed on the yellow light. She maintained in cross-examination that she was certain she was not exceeding the 50 km/h speed limit. Ms. Corbett testified that she accelerated and "committed to go through" when the light was still green. The light did not turn yellow until she was at the cross-walk, at which point she was not in a position to stop safely.
- [23] In cross-examination, Ms. Corbett agreed that she entered the intersection on a yellow light, and that she was accelerating at the time. She added that when she realized the light had not turned yellow as she got close to the intersection, she "cursed" to herself, and then committed and accelerated. She explained that she cursed because she prefers to stop at yellow lights, but in this case she did not stop because the light turned too late.
- [24] Ms. Corbett testified that she did not see the plaintiff's red Honda until she was well into the intersection. The plaintiff's car had already started its left turn before entering the intersection. She estimates that she was already in the middle of the intersection when the plaintiff's car turned in front of her. It cut right in front of her. She "slammed on the breaks" at the last minute, but it was too late, and the front of her truck hit the car, which then spun around and made impact with her truck a second time. The entire event happened too quickly for her to think. Ms. Corbett testified that she was two thirds of the way through the intersection when the collision occurred.
- [25] In cross-examination, Ms. Corbett maintained that she did not see the plaintiff's car until she was in the intersection. It was already turning, at a sharp angle, and it cut in front of her, "trying to beat the light". Her assessment of the situation was that she was "probably a bit too cautious", and she would have gone through the intersection while the light was still green if she had not allowed her truck to slow going up the hill. By the time she got to the intersection, she was not in a position to stop. She "committed to go through", and then "within that second" the light went yellow.
- [26] Ms. Corbett conceded that she was unable to recall where she was coming from or where she was going when the collision occurred. When challenged in cross-examination as to her memory of the collision itself, Ms. Corbett responded that she has "a clear memory of these events", but then qualified that statement by saying, "whether that is accurate, that is what I can see".

[27] Ms. Corbett testified that inside the truck, the impact of the collision did not feel particularly significant. The truck came to rest on Gladwin Road, facing more or less southbound, or at a slight angle. After the collision, Ms. Corbett's primary concern was for the well-being of her daughter who, as noted above, had been seriously injured in an earlier motor vehicle collision. Ms. Corbett had no dealings with Mr. Enns at the collision scene.

(2.2) Effects of the Collision on Mr. Enns

[28] At the time of the collision, Mr. Enns was 28 years old. He was single and lived with his father and stepmother in Chilliwack. Mr. Enns was a reasonably healthy and active young man, subject to the previous medical issues and injuries addressed below. He was working as an edge grinder at a kitchen cabinet manufacturing business, earning \$25 per hour. The work was somewhat physically demanding and Mr. Enns was able to do it without any difficulty. He liked to bike ride, golf, and play slow-pitch softball.

[29] There is some indication in the clinical records that Mr. Enns was involved in an incident in 2015 in which he fell off a ladder at work, causing him to suffer a mild concussion and neck and lower back pain. There is no direct evidence before the court with respect to this incident, and no suggestion that Mr. Enns was suffering any lasting effects from this prior incident by the time of the collision in April 2016.

[30] More significantly, Mr. Enns also suffered a prior injury to his tailbone when he fell down a ravine in March 2015. The tailbone injury was successfully treated with a cortisone injection and was not causing Mr. Enns any continuing difficulty by the time of the 30 April 2016 collision for which he now seeks damages. After the collision, the pain in Mr. Enns's tailbone area returned. There is a dispute between the parties about whether the tailbone injury was re-activated or re-aggravated by the collision, or whether it simply re-emerged after the benefits of the previous cortisone treatment had worn off.

(2.2.1) Immediate Aftermath of the Collision

[31] In the days following the collision, Mr. Enns had significant tenderness and bruising over his shoulder around the position of the seatbelt. He was also experiencing tension and muscle spasms in his neck. He went to a walk-in medical clinic with these complaints.

[32] Within about a week of the collision, Mr. Enns began to experience more significant pain in his neck and low back, and headaches accompanied by nausea, dizziness and blurred vision. These problems affected him at work, and he lost his job at Excelsior Kitchens in circumstances described in detail below.

[33] On 9 May 2016 - some three weeks after the collision - Mr. Enns went to see his primary care physician, Dr. Page, complaining of pain in his neck and shoulders, hips, and, as noted in Dr. Page's records, "pain over coccyx". These records reflect that Mr. Enns had previously experienced pain in his tailbone due to a fall, but this condition "improved after injection". Under the document agreement between the parties to this proceeding, these records are not admissible for their truth, but are admissible for the fact of what was reported by Mr.

Enns at that time. Dr. Page prescribed pain medication and referred him to counselling to deal with the stress of the collision. Mr. Enns testified that he filled the prescription but did not follow Dr. Page's recommendation for counselling, explaining that he had multiple stressors in his life at the time and was not emotionally ready to see a counsellor.

(2.2.2) Ongoing Symptoms

[34] Mr. Enns testified that in the four plus years since the collision, his neck, low back, and tailbone problems have persisted. He has also developed what has been referred to in the evidence as a mood disturbance. I will address each set of symptoms under a separate heading.

(2.2.3) Neck Pain, Shoulder Pain, and Headaches

[35] Mr. Enns testified that he experiences ongoing neck and shoulder pain. The pain is made worse by overhead work, including reaching up with his arms or looking up, both actions which electricians are commonly required to do. When the pain comes on it can last for one or two days at a time. The neck and shoulder pain can also trigger headaches, discussed in more detail below.

[36] In cross-examination, Mr. Enns agreed that in an appointment with his family physician Dr. Dhingra on 14 March 2017, he may have said that by that time the pain was "improving", although at one point in his testimony Mr. Enns added that any such improvement was probably only "temporary". Mr. Enns also agreed that he may have told Dr. Dhingra that the pain was of "mild to moderate" intensity. The bottom line is that in cross-examination Mr. Enns appeared to agree that his neck and shoulder injuries have improved somewhat over time but they have most certainly not completely resolved.

[37] With regard to his headaches, Mr. Enns testified that they can last for a day or more and he described the effects as almost debilitating. In addition to the pain, his headaches also cause nausea, dizziness, and sensitivity to light. There was a period of time immediately after the collision when he had headaches eight to nine times per month. By the time of trial, the frequency of headaches had decreased to about two or three times per month. Mr. Enns did not explicitly say so in his testimony, but I infer from his evidence as a whole that the headaches can be brought on by the kind of activity that causes flare-ups in his neck and shoulder pain.

(2.2.4) Low Back Pain

[38] Mr. Enns testified that he experiences back pain across the base of his spine. He described it as a shooting pain or a burning sensation. When asked to rate the intensity of the pain, Mr. Enns responded that it was usually a six or seven out of ten. He experiences this pain about five to seven times per week. The pain is brought on or aggravated by activities where he is required to bend forward at the waist. The pain is less frequent when he is not working. Some days, particularly those where he is inactive, he is pain free. In cross-examination, Mr. Enns agreed that there have been periods of time over the past four years when his low back

pain was improving somewhat with therapy.

(2.2.5) Tailbone Pain

- [39] Mr. Enns described his tailbone pain as an excruciating, almost unbearable sharp pain. He rated the intensity of the pain at eight out of ten. With respect to duration and frequency, Mr. Enns testified that the pain is more or less constant when he is required to sit for any appreciable period of time, or when he wears a heavy tool belt, or he is required to squat.
- [40] Mr. Enns testified that he initially hurt his tailbone in a fall that took place some time before the collision. In chief, Mr. Enns said the fall occurred in 2014, and that he got treatment for it in 2015. He went to the hospital for an X-ray on 31 October 2015, and went to see Dr. Page on 6 November 2015. Dr. Page diagnosed coccydynia, and administered a cortisone injection which made the pain go away. Mr. Enns testified that he did not experience tailbone pain again until after the collision.
- [41] In cross-examination, when prompted by entries in clinical records, Mr. Enns agreed that he in fact injured his tailbone in a fall that took place in March 2015. He said the cortisone injection gave him up to six months of relief. When it was suggested that the benefit of the cortisone injection might have worn off right around the time when he started to experience tailbone pain again, shortly after the collision, Mr. Enns appeared to agree. However, he testified that since the collision further injections have not given any lasting relief.
- [42] Mr. Enns testified that at this point the only thing he can do to reduce or eliminate the tailbone pain when sitting is to use a donut cushion. He has been advised about the possibility of surgery on his coccyx, but it appears that this is not a recommended course of treatment at this point due to the risk of post-operative complications, including the risk of developing serious and debilitating dependence on post-operative pain medications.

(2.2.6) Disruption of Sleep Pattern and Emergence of Mood Disturbance

- [43] Mr. Enns testified that his physical injuries have affected his sleep pattern. His low back pain throbs and causes tingling and "restless feet". This makes it difficult for Mr. Enns to fall asleep, or causes him to wake up at which point he cannot fall back asleep. It generally takes Mr. Enns about one hour to fall asleep. He gets a total of four or five hours of sleep per night. He will often go to bed at 8:00 or 9:00 pm, sleep until about 11:00 pm, and then toss and turn until about 3:00 am before getting up for the day. This poor sleep pattern has been more or less constant since the collision.
- [44] Mr. Enns's testimony on this point is corroborated by the evidence of his wife Julianne, who met Mr. Enns in December 2016 and married him in June 2018. She confirmed that Mr. Enns only gets three to five hours of sleep per night, often gets up and walks around, and generally tosses and turns all night.

[45] Mr. Enns testified that when he is in pain he can become agitated, cranky, and short-tempered with those around him. He worries that he may never get better, particularly after trying numerous therapies and treatments as recommended by his doctors as addressed below. He worries that his pain and limitations will affect his ability to properly parent should he and his wife decide to have children. The chronic pain causes Mr. Enns to feel "down", and he finds it difficult to talk about it.

(2.3) Treatment

[46] The following is a list of the various therapies and treatments Mr. Enns has pursued in the wake of the collision:

- a) Primary Care: Mr. Enns was treated by Dr. Page throughout 2016. Since 2017, Mr. Enns has been under the care of Dr. Dhingra.
- b) Physiotherapy: Mr. Enns attended nine sessions between January and September 2017. He did not continue with physiotherapy after this, even though it was recommended by his primary treatment provider, Dr. Dhingra. He testified in cross-examination that he did not see fit to pay for treatment that was not giving him lasting results. He added that in his mind he was still attending physiotherapy, but might not have been able to go from time to time because of his work schedule. He also testified that he did home-based exercises and stretching as recommended by his physiotherapist.
- c) Chiropractic Treatments: The admissions of fact indicate that Mr. Enns received a total of 24 chiropractic treatments over the four-year period from May 2016 until May 2020. In his viva voce testimony, Mr. Enns added that up until the pandemic, he had been seeing a chiropractor once per week. Of all the various kinds of treatment he has received, Mr. Enns feels that chiropractic treatments have offered him the most benefit. He feels that the chiropractic sessions improve his circulation, help him to relax, and bring him back to a state of "normal" for as much as three or four days at a time.
- d) Massage Therapy: Mr. Enns attended for a massage therapy session in March 2018. He did not continue with massage therapy because it was "very expensive", and he experienced no real relief from this treatment. He contrasted this with the chiropractic treatments, which he found to be more effective in addressing his symptoms.
- e) Cortisone Injection: Mr. Enns received a cortisone injection, for treatment of his coccyx pain, in September 2018. Mr. Enns testified that cortisone injection treatment can give him four to six months of relief from the pain in his tailbone. Mr. Enns also testified that he has had "a few other injections" but at this point his only relief from the tailbone pain is from using a donut cushion.
- f) Trigger Point Injections: Mr. Enns received trigger point injection treatments on 16 April 2019 and 29 April 2019. Mr. Enns testified that these treatments gave some immediate relief because of the numbing agent, but the benefits only lasted for a day or two.

- g) Psychological Counselling: Mr. Enns testified that in around December 2016, he had several "informal" counselling sessions with Mr. Solla, a psychologist who Mr. Enns knows as a family friend. Mr. Enns began seeing Mr. Solla for regular monthly counselling sessions commencing in June 2018.
 - h) Medication: Mr. Enns has taken a variety of pain medications including Cyclobenzaprine, Naproxen, Advil, and Tylenol 3. More recently, he has been taking Aventyl to help him sleep and manage his mood condition.
- [47] There is some evidence that Mr. Enns did not pursue recommended treatments at the earliest possible opportunity, and that he was not entirely forthcoming in providing information to his treatment providers. Specifically:
- a) Mr. Enns testified that he did not follow Dr. Page's initial recommendation on 6 May 2016 for psychological counselling, because he was not emotionally ready to see a counsellor. Mr. Enns did not seek out any counselling until December 2016, after which he had two informal meetings with Mr. Solla. Mr. Enns did not seek any more counselling until June 2018, when he started to see Mr. Solla for regular monthly counselling sessions.
 - b) Mr. Enns told Dr. Dhingra that he was able to have physiotherapy treatments for a period of time before moving to a small town in the summer of 2016. This was not true, as Mr. Enns did not in fact receive any physiotherapy treatments before he left the Fraser Valley for 100 Mile House in the summer of 2016. Mr. Enns also told Dr. Dhingra on multiple occasions that he was attending physiotherapy on an ongoing basis when in fact he was not. Mr. Enns attempted to explain this by pointing out that at the relevant time he was in fact doing home-based exercises. I do not accept this explanation as credible. It seems obvious to me that Mr. Enns would have fully appreciated the difference between physiotherapy and home-based exercises, even if recommended by a physiotherapist.
 - c) Mr. Enns did not tell Dr. Dhingra about his tailbone injury. Mr. Enns explained that he only dealt with Dr. Page regarding the tailbone injury, "so I would avoid inconsistent treatment", which seems to make little sense. At one point Mr. Enns asked Dr. Dhingra to write him a prescription for a special chair to sit in while attending an electrician training program at Sprott Shaw College, but even still Mr. Enns did not tell Dr. Dhingra about the nature or origin of his tailbone problem. Mr. Enns explained in cross-examination that he just wanted to deal with Dr. Page on the tailbone issue, "because he gave me an injection and that helped".
 - d) To the same effect, when Mr. Enns saw Dr. Maloon, a specialist, regarding the tailbone condition, he did not disclose his other symptoms or injuries. Mr. Enns's explanation for not doing so was once again illogical and contrary to common sense.

(2.4) Effect of Post-Collision Symptoms on the Plaintiff's Lifestyle and Work

- [48] Mr. Enns testified that his neck pain, low back pain, tailbone pain, and associated headaches have affected his life in a variety of ways, beyond the effect on his sleep and mood as described above.
- [49] First, Mr. Enns no longer engages in physical activity like bike riding, golfing, or playing softball. Mr. Enns also has difficulty driving, both because he is fearful of collisions, and because of difficulty sitting for prolonged periods. The evidence about effects on Mr. Enns's lifestyle was corroborated by testimony from a friend, Cory Robertson, his mother Sandra Enns, and to a certain extent the testimony of his wife Julianne, although it must be noted she did not meet Mr. Enns until six or seven months after the collision.
- [50] Second, the plaintiff's post-collision injuries have had some impact on his activities of daily living. He finds it difficult and painful to lean forward while shaving. He also finds it painful to do household chores like vacuuming, washing dishes, laundry, lawn mowing, and gardening. Julianne Enns testified that over time she has largely taken over these household responsibilities.
- [51] Third, the plaintiff's injuries have impacted the relationship with his wife. Mr. Enns testified that he is often angry and irritable, closed off, finds sexual intimacy difficult, and worries about his ability to parent if he and Ms. Enns choose to have children. The plaintiff's evidence on this point was entirely consistent with the testimony of his wife, who was not cross-examined by counsel for the defendants.
- [52] Fourth and finally, the injuries have impacted Mr. Enns's ability to work. More specifically:
- a) Several weeks after the collision, Mr. Enns lost his job as an edge grinder at Excelsior Kitchens, when he made a mistake and ruined some \$10,000 worth of materials. Mr. Enns testified that at the time he was unable to concentrate on his work because of soft-tissue pain, headaches, nausea, dizziness, and a lack of sleep. It was a full-time job that paid \$25 per hour.
 - b) Thereafter Mr. Enns, who had previously completed his first year of the three years of training required to become an electrician, got a series of jobs working in that field. This included stints of work at Garth's Electric, Allwest Electric, Red Seal Electric, and Western Oil. He was unable to hold down any of these jobs for more than eight or nine months at the longest, for a variety of reasons.
 - c) Although Mr. Enns quit, was fired, or was laid off from all of these positions for reasons that are not directly related to his injuries, Mr. Enns did testify about significant physical challenges and limitations he faced at each workplace. As a general rule, Mr. Enns's neck, back, and tailbone injuries have placed limits on his ability to reach, work overhead, lift or dig, crouch down, bend over, or work in awkward body positions as electricians are often required to do.

- d) In between his work at Allwest Electric and Red Seal Electric, Mr. Enns took about six months away from the work force to complete his second and third years of study to become a certified journeyman electrician. To obtain certification, Mr. Enns must also complete a formal apprenticeship, which he has yet to do.
- e) In April 2019, Mr. Enns started work at INT Electric. He described this as a commercial electrical firm. His job involved bending and installing pipes that contain electrical wiring. It was somewhat less labour intensive, physically demanding, and repetitive than some of the other electrician jobs he had done, but Mr. Enns still had difficulty because he had to work on ladders, move heavy objects, and bend down to work on plugs, all of which contributed to his neck and back pain, muscle spasms, and tension headaches.
- f) In about October 2019, Mr. Enns left INT Electric for a full time job at Stellar Power, earning \$25 per hour. Mr. Enns learned about this job through his wife, who also works there. Stellar Power manufactures electrical boxes for commercial or industrial filtration systems. The job does not involve any heavy lifting or digging, and Mr. Enns can do his work from an adjustable work bench, allowing him to avoid awkward or stressful body positions. Mr. Enns worked with Stellar Power until the business shut down in the spring of 2020 due to the pandemic, but he expects to be re-hired when they re-open.

(2.5) Expert Medical Evidence

(2.5.1) Dr. Sangha

- [53] The plaintiff called Dr. Sangha, an expert in physical medicine and rehabilitation. He was qualified to give opinion evidence concerning individuals involved in motor vehicle collisions and subsequently suffering from soft tissue myofascial pain conditions, including issues of causation, diagnosis, treatment, and prognosis.
- [54] Dr. Sangha's physical examination of Mr. Enns on 16 November 2019 revealed: (a) some limitation of flexion around the cervical spine, with objective signs of discomfort in the trapezius on movement, and trigger points in the upper trapezius ridge, (b) no significant inspectional findings with respect to the shoulders, (c) tautness and tenderness at the lower back, with evidence of "wind up" phenomenon and limitations in lateral flexion, and (d) exquisite tenderness and evidence of wind up over the coccyx region.
- [55] Dr. Sangha's diagnosis, under the heading "Impression" in his written report, is that Mr. Enns suffered the following injuries or conditions as a result of the indexed vehicle collision: (a) lumbrosacral strain, in other words a strain of the low back, with facet-mediated pain, together with secondary or reactionary muscle spasms, (b) a "re-aggravation" of "previously resolved" coccydynia, (c) cervical strain, in other words a strain of the neck, with chronic myofascial impairment involving the upper trapezius, and (d) disordered sleep and psycho-emotional distress.

- [56] Dr. Sangha's report also indicates that the low back, tailbone and neck injuries are all complicated by "central sensitization", which is a learned response to pain, elicited by touch or movement of the affected area. This aspect of Dr. Sangha's opinion would appear to correspond with his observation of "wind up" behaviour, explained in Dr. Sangha's viva voce testimony as a phenomenon whereby a person who experiences chronic pain presents with greater sensitivity and diffusion of pain than might normally be expected for a particular physiological condition or injury.
- [57] With respect to prognosis, Dr. Sangha opined that by the time of his assessment more than three years after the collision, Mr. Enns had reached maximal medical recovery. The nature and longstanding duration of Mr. Enns's injuries are negative prognostic indicators, and the likelihood of further recovery is "negligible".
- [58] Dr. Sangha's opinion was that the collision-related injuries have left Mr. Enns with "diminished physical and functional tolerances". In particular, Mr. Enns experiences limitations in relation to (a) repetitive or prolonged activities at or above shoulder level, (b) activities that place strain on the neck, including lifting, bending, pushing, and pulling, and (c) activities that involve sustained postures.
- [59] Dr. Sangha opined that Mr. Enns's current presentation is "directly and causally related" to the collision. In Dr. Sangha's view, the pre-existing tailbone injury had resolved and was re-aggravated by the collision. The tailbone condition had been successfully treated and then materially deteriorated after the collision.
- [60] In discussing future treatment, Dr. Sangha expressed the concern that Mr. Enns's condition appears to be "devolving into a chronic pain syndrome". His weight gain, deconditioning, and apparently unmet psycho-emotional needs were of particular concern. Dr. Sangha recommends a "multi-pronged" intervention, including additional pain medications, physical fitness training, and continued psychological counselling.
- [61] In cross-examination, Dr. Sangha was prepared to revisit his opinion that the collision "re-aggravated" the "previously resolved" coccydynia in light of a mistaken assumption about the timing of the tailbone injury. Dr. Sangha's assumption was that the injury occurred in 2014, when in fact Mr. Enns fell and injured his tailbone in March 2015. In this regard, Dr. Sangha agreed that it "might not be correct" to say the coccydynia was "previously resolved". Dr. Sangha was less certain about whether or how the mistaken assumption impacted his opinion as to causation. Dr. Sangha maintained that even if the tailbone injury had not healed by the time of the collision, the forces involved may well have aggravated the tailbone condition. Given the high energies involved, leading to lower back injuries around the same anatomical area, Dr. Sangha considered it more likely than not that the collision materially contributed to the subsequent and continuing coccyx pain.

- [62] Dr. Sangha agreed in cross-examination that when physiotherapy is recommended for treatment of collision-related injuries, it is generally better to begin the treatment earlier, before the patient begins to experience secondary muscle or joint changes, fear and pain avoidance, deconditioning, or central sensitization. Dr. Sangha acknowledged a real possibility that timely physiotherapy could reduce or prevent central sensitization.
- [63] Dr. Sangha also agreed that where a patient fails to inform the treatment provider about other medical treatments, or states that he or she is pursuing prescribed treatment when that is not the case, this would undermine the "therapeutic alliance" and could affect the course of future treatment. Thus it is "not advisable" for a patient to withhold information based on what the patient believes is relevant.
- [64] In re-examination, Dr. Sangha clarified that even if Mr. Enns's tailbone injury was not causally related to the subject collision, this would not affect his overall prognosis. The key issues were the neck and lower back injuries, and the coccyx injury was not the most "salient" condition as far as prognosis was concerned.

(2.5.2) Dr. Lu

- [65] The plaintiff also called Dr. Lu, a psychiatrist. The Court recognized Dr. Lu as an expert qualified to give opinion evidence with respect to diagnosis, treatment, management, causation, and prognosis of mental disorders, including maladaptation relating to mood, behaviour, and chronic pain.
- [66] Dr. Lu personally met with and interviewed Mr. Enns on 18 December 2019. He noted Mr. Enns to be attentive and responsive during the interview. Mr. Enns showed a full range of affect, was tearful at times, and showed no signs of exaggerated or amplified pain response.
- [67] Dr. Lu concluded that Mr. Enns meets the diagnostic criteria for chronic "adjustment disorder", due to combined impact of pain and associated physical limitations. Dr. Lu opined that pain is the primary cause of Mr. Enns's psychological distress, and his adjustment disorder is chronic due to the enduring nature of his pain. In this sense, Mr. Enns's adjustment disorder and pain are "mutually exacerbating". Dr. Lu was unable to delineate the point in time at which the adjustment disorder materialized.
- [68] Dr. Lu further concluded that Mr. Enns does not fully meet the diagnostic criteria for major depression. He has some features of depression, but not the severe mood changes and functional impairment associated with major depression.
- [69] With respect to prognosis, Dr. Lu opined that Mr. Enns's adjustment disorder will wax and wane with his physical symptoms and psychological stressors. He will continue to have psychological challenges as long as he continues to suffer from chronic pain and associated limitations. His prognosis is uncertain. There are some protective factors, but the controlling consideration would appear to be ongoing pain, which is the central cause of the adjustment disorder. Furthermore, given the likelihood that Mr. Enns's chronic pain will not resolve, he is at risk of further deterioration of his psychological condition.

- [70] With respect to treatment, Dr. Lu considered Mr. Enns to be in a critical period of potential recovery. At the time of the interview in November 2019, Mr. Enns was working and interested in advancing his career, and somewhat stoic. However, Dr. Lu opined that Mr. Enns requires continuing psychological counselling to help him cope with his chronic physical symptoms and psychological stressors. Dr. Lu recommended a course of 12 to 24 cognitive behavioural therapy sessions with specific focus on pain management.
- [71] In cross-examination, Dr. Lu agreed with the suggestion that early intervention or engagement with a therapist could reduce the severity of a psychological condition. However, he added that delay in the treatment of psychological conditions is so common that it is difficult to put any real weight on it as a factor. As an example, Dr. Lu explained that the average delay between the onset of PTSD and treatment is seven years. There is often a time lag between the development of a psychological condition and treatment due to the stigma around mental health conditions and an associated reluctance of the patient to open up about such things. Dr. Lu agreed that a primary care physician, such as a family doctor, would be equipped to identify a need for psychotherapy and make a referral.

(2.5.3) Dr. Calvert

- [72] The defendant called Dr. Calvert. The Court recognized him as an expert in orthopedic medicine, including the identification and treatment of musculoskeletal injuries in accident victims, including but not limited to tailbone injury.
- [73] Based on his physical examination of Mr. Enns on 4 June 2020 and his review of the relevant medical records and reports, Dr. Calvert opined that:
- a) Mr. Enns experienced soft tissue injury to the cervical spine and low back. The mechanism described with respect to the subject collision is reasonable in causing neck and low back symptoms of the sort identified by Mr. Enns. The diagnosis of soft tissue injury is based largely on the nature of the collision and Mr. Enns's reported symptoms. There are multiple records substantiating the neck and low back pain post-collision. There is no objective testing that would definitively show a soft tissue injury of this type.
 - b) Although Mr. Enns indicates an aggravation of his coccyx due to the collision, the medical records are "more supportive of tailbone symptoms restarting in June 2016", per the notations of Dr. Page. There is therefore a "discrepancy regarding the timing of presentation" with respect to the coccyx pain.
 - c) With respect to prognosis, Mr. Enns has probably experienced maximal medical improvement. In other words, his recovery has plateaued and his symptoms will be ongoing.
 - d) With respect to the effect of these injuries on functionality, Mr. Enns is said to have a permanent "partial disability" in relation to actions involving repetitive overhead lifting, reaching, crouching, ladder work, and heavy lifting. The stated disabilities are "reasonable and in keeping with [the plaintiff's] stated symptoms", although Dr. Calvert qualified this

somewhat by noting that such limitations are "often subjective" and based on an interpretation of the patient's stated symptoms. Mr. Enns could continue to work in his current field, as an apprentice electrician, so long as he is in a position that is "less laborious" and does not involve digging, heavy lifting, and awkward positioning.

- e) With respect to treatment, Dr. Calvert recommended an ergonomic assessment, a program to wean Mr. Enns from reliance on Tylenol 3 for treatment of pain, weight management, and possible treatment for mood disorder.

[74] In cross-examination, Dr. Calvert agreed that the gap between the collision and the reporting of coccyx symptoms was approximately one month at maximum. He agreed that where a person suffers multiple injuries from a collision, it may take some time for the person to realize or recognize all of the injuries.

(2.6) Functional Capacity and Vocational Rehabilitation

[75] The plaintiff tendered an expert report from Russell McNeil, an occupational therapist and certified Work Capacity Evaluator. Mr. McNeil's report speaks to the plaintiff's functional limitations and capacity to perform the physical demands of various occupations.

[76] Mr. McNeil met personally with Mr. Enns on 15 January 2020. In physical testing, Mr. McNeil observed Mr. Enns to be consistently using postural accommodations to complete various tasks. He displayed no fear avoidance, and no inappropriate illness behaviour. Overall, his reports of pain and physical restrictions were consistent with his measured and observed abilities. His level of effort in testing was genuine and consistent. Objective signs of effort were present.

[77] Mr. McNeil's conclusions, which were not challenged by counsel for the defendants, were as follows:

- a) Mr. Enns has demonstrated restrictions in his capacity to perform various tasks including static lifting, horizontal reaching, and tasks requiring sustained crouching, bending, or neck extension when working overhead. His reports of pain were consistent with physical observations.
- b) Mr. Enns is capable of working in sedentary occupations. He may struggle with prolonged sitting, but this could be managed with appropriate ergonomic accommodation. Mr. Enns is therefore competitively employable in sedentary occupations.
- c) Mr. Enns can meet the strength demands of occupations involving light physical work, but is restricted in his capacity to work in occupations requiring static overhead or horizontal reaching, or static or dynamic spinal positioning such as crouching, kneeling, or bending, looking down, or looking up. Mr. Enns would struggle to maintain a productive work pace, and would require accommodation that would adversely affect his employability in work of this sort.

- d) Mr. Enns did not achieve the strength requirements to perform work with medium or heavy physical demands.
 - e) Mr. Enns has demonstrated restrictions in his capacity to perform work as an electrician on a full time basis at a competitively employable work pace. He would require accommodations to manage ongoing pain and physical restrictions. He is "not well suited" for the physical demands of work as an electrician. He would struggle to maintain a productive work pace and would have difficulty managing persistent pain. His opportunities for work as an electrician are limited.
 - f) Mr. Enns has the physical capacity to perform household chores, home maintenance, and yard work, but would have to pace himself to manage his back and neck pain.
- [78] The plaintiff also tendered an expert report from Pieter van den Berg, a vocational rehabilitation specialist. The report speaks to Mr. Enns's residual employability, and salary ranges in a variety of alternative vocations.
- [79] Mr. van den Berg met with Mr. Enns, interviewed him, performed a variety of vocational skills tests, and ultimately concluded that:
- a) Mr. Enns has likely sustained a reduction in his vocational options as a result of functional limitations from the 16 April 2016 collision. He has the capacity for competitive full time employment in some fields, but will have to be selective in his vocational choices.
 - b) Given the results of Mr. McNeil's Functional Capacity Evaluation, Mr. Enns is not well suited for future work as an electrician.
 - c) Mr. Enns likely has the capacity for further study or retraining in trades. He has transferrable skills for occupations requiring average general learning ability, verbal and numerical ability, clerical aptitude, motor coordination, and manual dexterity.
 - d) Absent the 16 April 2016 collision, Mr. Enns's "vocational trajectory" was dependant upon a number of factors including his relative youth, the fact that he had already completed his first year of electrician's training, and his employment as a machine operator at the time of the collision, which he enjoyed and planned to keep for some time. Despite this, Mr. van den Berg opined that it is likely Mr. Enns would have either been laid off or reached a point where the machine operator job was no longer sufficiently rewarding or challenging to him. Given his aptitudes, his prior training, and the potential for higher remuneration, Mr. Enns would likely have returned to school to complete his electrician's training with a view to becoming a qualified journeyman electrician.
 - e) Mr. Enns's "vocational trajectory" has been altered by the collision and its effects. Mr. Enns has likely sustained a reduction in his overall range of job options. He does not appear to meet the strength requirements of his pre-collision job as a machinist, and also no longer has the capacity to meet the physical demands for work as an electrician.

- f) Mr. Enns's current work as an apprentice electrician at Stellar Power is less physically demanding and involves mostly assembly-type work in a workshop. His ability to maintain that job is dependant upon the ability to manage his pain symptoms and the employer's willingness to accommodate his limitations. With regard to future vocational prospects, his options are limited to "a select range of occupations", and he may require formal retraining.

(3) Liability for the Collision

(3.1) Witness Credibility and Reliability

- [80] I am satisfied that Mr. Enns gave a credible and reliable account of his actions leading up to the collision. In the face of vigorous cross-examination, his description of the event was internally consistent, consistent with those aspects of the other witness testimony which I have accepted, and entirely consistent with the photographic evidence. Mr. Enns fairly conceded certain points, specifically that he did not see what color the light was when the defendant's truck entered the intersection, and that he could not say how fast the truck was going. As to the entry in the clinical records to the effect that his car was going 50 km/h at the time of the collision, I cannot reach any conclusion about precisely what Mr. Enns said, or the context in which he said it, and I accept his trial testimony regarding the speed at which he was traveling as discussed below. I also reject the submission of defendant's counsel that Mr. Enns was lying when he said he was not eating a cheeseburger before the collision, for the reasons given below. However, his explanations for the failure to attend physiotherapy and his failure to inform all of his doctors about his injuries were not credible.
- [81] With respect to the testimony of the two independent eyewitnesses, Ms. Toplass and Mr. Webb, I agree with defence counsel's submission that there is a serious inconsistency in their respective accounts. In particular, Ms. Toplass testified that when she first saw the defendant's truck, the light on the east side of the intersection was a green arrow, and Mr. Webb testified that when he first saw the truck, the light on the west side of the intersection was solid green. Both accounts cannot be correct, since a green arrow is an advance signal that only operates while the light for oncoming traffic remains red. This logical discrepancy on a key point requires me to exercise caution in assessing the evidence of these two witnesses concerning the timing of the lights.
- [82] I find it noteworthy that Ms. Toplass was not a driver, but rather a passenger whose attention was not on the road until the driver in her vehicle said something about the defendant's truck as it approached the intersection. By the time Ms. Toplass looked up, the defendant's truck was already in the intersection. Thus, one cannot say based on the testimony of Ms. Toplass alone what color the light was when the truck entered the intersection. As to the state of the light in front of her, after careful consideration I cannot accept Ms. Toplass's testimony that the light in front of her was displaying a green arrow when she first saw it. Ms. Toplass was not a driver, but a passenger, and she was admittedly not paying attention to the road until the driver in her car called her attention to the truck. Ms. Toplass may now

recall that the light was a green arrow, but that is impossible to square with the testimony of Mr. Webb, described below, that the light on his side of the street was green when he first saw the truck coming through the intersection. Ms. Toplass honestly believes the light was displaying a green arrow, but I cannot accept her testimony on this point as accurate.

- [83] By contrast to Ms. Toplass, Mr. Webb was in fact driving his vehicle, and thus much more likely to have had his full attention on the road at the time of the events in question. Accordingly, I have greater confidence in the reliability of Mr. Webb's assertion that the light in front of him, that is, the east-west light for traffic on McClure Road, had turned solid green at the point in time when he first caught sight of the defendant's truck. However, once again Mr. Webb did not actually see the defendant's truck enter the intersection. Thus one cannot say based on Mr. Webb's testimony alone what color the light was when the truck actually entered the intersection. The most that can be said is that when Mr. Webb first saw the truck - after it was already in the intersection - the light for east-west traffic on McClure Road was green, meaning that by that point in time the light for north-south traffic on Gladwin Road had turned red.
- [84] Turning to the testimony of Ms. Corbett, while I am satisfied that she tried her best to honestly describe what happened, I have concerns about the reliability of her account, for the following reasons:
- (a) In her examination in chief, Ms. Corbett testified that the light did not turn yellow until after she entered the intersection. Later, she said she definitely did not enter the intersection on a red light, which I interpret to be a tacit admission that the light might have been yellow, but it was definitely not red. In cross-examination, Ms. Corbett agreed she "entered the intersection on a yellow light".
 - (b) Ms. Corbett testified that she was half-way through the intersection when she first saw the plaintiff's car, and "about two thirds through the intersection" when the plaintiff's car "cut in front of her" and collided with her truck. If that were true, it would mean Mr. Enns's car turned into the eastbound lane of McClure Road, heading westbound into oncoming traffic. This does not accord with common sense, the photographs, or the testimony of Mr. Enns and Mr. Webb. The collision clearly occurred at or shortly after the point in time when Mr. Enns had completed his left turn, at which point his car was in the intersection, heading west in the westbound lane of McClure Road. Ms. Corbett's truck therefore could not have been two thirds through the intersection. Rather, the truck must have been less than halfway through the intersection at the point of the collision.
 - (c) Ms. Corbett appeared to give two separate and mutually inconsistent descriptions of the path that the plaintiff's vehicle took as it drove through the intersection. On the one hand, Ms. Corbett asserted that when she first saw the plaintiff's car it was just before the crosswalk, already turning before even entering the intersection. I took this to be an assertion that Mr. Enns was engaged in a sweeping left turn through the entire length of the intersection. However, Ms. Corbett also said the plaintiff's car "cut in front of [her]", at a

"sharp" or "steep" angle. This leaves the impression that Mr. Enns turned sharply to cut in front of Ms. Corbett's truck at the last minute. Counsel for Ms. Corbett suggested in argument that in using the terms "sharp" or "steep", Ms. Corbett may have been attempting to describe a sweeping turn, in other words, a turn at an extremely obtuse angle. In my view, that interpretation is not consistent with the manner in which Ms. Corbett used the terms "sharp" and "steep" angle. She testified that when she first saw the plaintiff's car it was at a "sharp angle" and that it "cut in front of her". Ms. Corbett used the phrase "steep angle" in a similar way in her testimony. I cannot interpret these as references to a wide or sweeping turn initiated before the plaintiff's car even entered the intersection, which is the other way Ms. Corbett described the path of the plaintiff's vehicle. Thus, in the course of her testimony Ms. Corbett gave two different accounts of the plaintiff's turn. It is theoretically possible that both were true, that is, that the plaintiff initiated a sweeping turn before even entering the intersection, and then turned sharply in front of Ms. Corbett just before the collision. But this is not what Ms. Corbett said. She described the plaintiff's turn one way in part of her testimony and a different way at another point in her testimony. Ms. Corbett gave two different accounts of the plaintiff's actions.

- (d) When challenged on her ability to accurately recall what happened, Ms. Corbett responded that she "has a clear memory of the events", but then offered a spontaneous and frank qualification by saying, "whether that is accurate" or not, it is how she sees it in her mind. I interpret this as a tacit acknowledgment by Ms. Corbett that her testimony describing the incident could be based at least in part on an inaccurate recollection, a reconstruction, or an ex post facto interpretation, as opposed to a completely independent recollection. This spontaneous qualification causes me to question the reliability of Ms. Corbett's account.

(3.2) Findings of Fact with Respect to the Collision

[85] I make the following findings of fact as to the events leading up to the collision, the collision itself, and its immediate aftermath:

- (a) Mr. Enns was initially travelling northbound on Gladwin Road, at approximately 50 km/h, as he approached the intersection. The light turned yellow before Mr. Enns reached the intersection, but he was unable to come to a safe stop, so he proceeded.
- (b) Mr. Enns shifted from third gear into second, slowing his car to a speed that was less than 50 km/h, in anticipation of a left hand turn onto McClure Road. When Mr. Enns began his turn, he did not see any oncoming traffic that would pose an immediate hazard.
- (c) Ms. Corbett was travelling southbound on Gladwin Road, slowing down as her truck rose up the hill leading to the intersection at McClure Road. The light turned yellow later than Ms. Corbett expected or anticipated. At this point, Ms. Corbett "cursed" and made a decision to "commit" and "accelerate".

- (d) The evidence does not establish that Ms. Corbett entered the intersection on a red light. Neither Ms. Toplass nor Mr. Webb saw the defendant's truck enter the intersection, thus neither witness could have seen the color of the lights at that time. Nevertheless, I accept the evidence of Mr. Webb, who was driving and thus paying attention to the state of the traffic light in front of him, that the light facing his direction turned green and he took his foot off the break to enter the intersection before the collision occurred. This supports the conclusion that at some point before the collision, the lights for northbound and southbound traffic had turned red. This in turn indicates that when Ms. Corbett's truck entered the intersection, the light was either red or stale yellow, not fresh yellow as she maintained in her testimony.
- (e) A number of times in her testimony, Ms. Corbett said she "committed" to enter the intersection, but at one point she testified that she "committed to go through", which based on the context and all of the evidence I interpret to mean that she committed to go through the intersection. Ms. Corbett did not testify that she made two separate decisions, the first being to enter the intersection and the second being to proceed through it. Also, Ms. Corbett did not just coast into the intersection, she accelerated. I find as a fact that when the light turned yellow, Ms. Corbett committed not to just entering the intersection, but to going through the intersection, and that is why she accelerated.
- (f) Having committed to going through the intersection, Ms. Corbett accelerated after the light turned yellow, before making any assessment as to whether she had the right of way. On her own evidence, she sped up to at least 40 km/h as she entered the intersection. By this time, Mr. Enns was well into the intersection and had initiated a left turn, traveling at approximately 30 km/h.
- (g) The collision occurred at or shortly after the point in time when Mr. Enns had completed his left turn. His car was facing west, in the westbound lane of McClure Road. The right front bumper of the defendant's truck impacted the passenger side of the plaintiff's car, causing the car to spin around and come to rest facing east.
- (h) After the impact, Mr. Enns briefly lost consciousness. He was stunned. He lost control of his bladder. When he came to, he wanted to get out of the car but bystanders told him to remain until first responders arrived. Mr. Enns was hungry and so, somewhat irrationally, took out a cheeseburger and started to eat it.
- (i) By the time Ms. Toplass arrived at the Enns vehicle, Mr. Enns had taken out a cheeseburger but had not taken any bites out of it. Mr. Webb arrived at the Enns vehicle after phoning 9-1-1. He saw Mr. Enns eating a cheeseburger and told him to stop, and Mr. Enns heeded the advice.

(3.3) Legal Principles

[86] The standard of care against which the driving of the parties is to be scrutinized is informed by the general duty of every motorist to drive with due care and attention, and by the rules of the road as set out in the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA]: see *Stewart v. Dueck*, 2012 BCSC 1729 at para. 40; *Julian v. Joyce*, 2016 BCSC 1417 at para. 13, aff'd 2017 BCCA 217. As explained in *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21:

In the end, a court must determine whether, and to what extent, each of the players in an accident met their common law duties of care to other users of the road. In making that determination, a court will be informed by the rules of the road, but those rules do not eliminate the need to consider the reasonableness of the actions of the parties. This is both because the rules of the road cannot comprehensively cover all possible scenarios, and because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way. While [the relevant provisions of the MVA] and other rules of the road are important in determining whether the standard of care was met, they are not the exclusive measures of that standard.

[87] Insofar as the statutory rules of the road are concerned, there are four specific provisions of the MVA which have particular relevance in the circumstances of this case. I will briefly summarize each of them.

[88] First, s. 128(1)(a) provides that a driver approaching an intersection on a yellow light must come to a stop before entering the intersection, unless the stop cannot be made safely.

[89] Second, s. 174 sets out the obligations imposed on a driver intending to make a left turn at an intersection. This section provides that where a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic from the opposite direction that is "in the intersection or so close as to constitute an immediate hazard", but having yielded and given a signal as required under ss. 171 and 172, the driver may turn left, and traffic approaching the intersection from the opposite direction must yield the right of way to the left-turning vehicle.

[90] Third, s. 170 sets out the duty of a driver to signal upon making a turn. More specifically, s. 170(1) states that "[i]f traffic may be affected" by a turn, the driver must not turn "without giving the appropriate signal". This must be read together with s. 170(2), which provides that if a turn signal is required, the driver "must give it continuously for sufficient distance before making the turn to warn the traffic".

[91] Fourth, there is a general duty on all motorists to drive with "due care and attention" and "reasonable consideration" for others on the road, as set out in s. 144.

[92] The following passage taken from *Nerval v. Khehra*, 2012 BCCA 436 at paras. 33-35 is helpful in delineating the respective obligations of a driver intending to turn left at a traffic controlled intersection and a driver proceeding straight through the intersection in the opposite direction:

- [33] The principles laid down in Pacheco [full citation: Pacheco (Guardian ad litem of) v. Robinson (1993), 75 B.C.L.R. (2d) 273 (C.A.)] lead to the conclusion that the starting point of the analysis is that when a left turning driver is assessing making a left turn in an intersection he or she must yield the right of way to oncoming traffic unless it is not an immediate hazard. Describing a driver as dominant means no more than that driver has the right of way, whereas the servient driver has the obligation to yield the right of way. The obligation imposed by s. 174 on the left turning vehicle is that it "must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard". A left turn must not be commenced unless it is clearly safe to do so. If there are no vehicles in the intersection or sufficiently close to be an imminent hazard, the driver may turn left and approaching traffic must yield the right of way. In other words, if a left turning driver complies with his or her obligation only to start the left turn when no other vehicles are in the intersection or constitute an immediate hazard, then the left turning driver assumes the relationship of being the dominant vehicle and approaching vehicles become servient and must yield the right of way.
- [34] As observed in Salaam v. Abramovic, 2010 BCCA 212 at para. 33, the words "immediate hazard" are "used to determine when a vehicle may lawfully enter an intersection. They determine who is the dominant driver, but do not, by themselves, define the standard of care in a negligence action."
- [35] The effect of s. 174 is to cast the burden of proving the absence of an immediate hazard at the moment the left turn begins onto the left turning driver. This result flows inevitably from the wording of the section itself, given the nature of the absolute obligation the section creates. If a left turning driver, in the face of this statutory obligation, asserts that he or she started to turn left when it was safe to do so, then the burden of proving that fact rests with them.
- [93] The case law holds that a vehicle is an "immediate hazard" if its driver must take a sudden or violent action to avoid the threat of collision with an oncoming or opposing vehicle. Temporally, the question as to whether a vehicle constitutes an immediate hazard is to be assessed at "the moment before" the left-turning driver starts to turn: Raie v. Thorpe (1963), 43 W.W.R. 405 at 406 and 414 (B.C.C.A.); Julian at para. 14; Lee v. Tse, 2013 BCSC 1740 at para. 57; Theiss v. Shorter, 2016 BCSC 1634 at para. 23.
- [94] I take further guidance from Ziani v. Thede, 2011 BCSC 895 [Ziani], wherein Madam Justice Bruce considered "the competing duties of a driver who is operating a vehicle that is in the process of turning left and a driver of an oncoming vehicle in a controlled intersection". The plaintiff, driving straight through the intersection, increased his speed to at least 50 km/h to "clear the intersection before the light turned amber". The plaintiff then changed lanes in the middle of the intersection to avoid the defendant's left-turning vehicle. Bruce J. reasoned that neither the plaintiff (who entered the intersection on a yellow light), nor the defendant (who incorrectly believed that he had an advance green light) had a presumptive right of way. Accordingly, the court had to "examine the conduct of each driver to determine if they

complied with their respective duties under ss. 174 and 128 of the Motor Vehicle Act". Bruce J. went on to find both parties to be equally at fault. For his part, the plaintiff failed to discharge his burden of showing that he could not safely come to a stop before entering the intersection on a yellow light. With respect to the defendant, he wrongly assumed that he had the right of way due to the presence of an advance turn signal, and on that basis failed to properly assess whether the plaintiff's vehicle posed an immediate hazard before completing his left turn. Bruce J. concluded at para. 29 that both drivers were at fault, similar to the case of *Shirley v. Regier*, [1997] B.C.J. No. 1035 (S.C.). In *Shirley*, the straight-through driver was at fault for running a yellow light, and the left-turning driver was at fault for proceeding into the turn when his view of the intersection and the oncoming traffic was partly blocked.

(3.4) Analysis

[95] Guided by the approach in *Ziani*, I will examine the conduct of the parties to determine the extent to which each of them met or departed from the standard of care owed to others on the road.

(3.4.1) Defendant's Conduct

[96] Beginning with Ms. Corbett, I must determine firstly whether she breached the relevant standard of care by entering the intersection. By way of context, one must keep in mind Ms. Corbett's acknowledgment that as she approached the intersection in question, the light was stale green and she was expecting it to turn yellow. Her testimony was somewhat imprecise as to the position of her truck when the light actually turned yellow. At one point she said the light turned from green to yellow "as [she] entered" the intersection. At another point she said the light turned when the truck was just before the crosswalk. Later, she agreed that she entered the intersection on a yellow light. Ms. Corbett further testified that she allowed her vehicle to slow to approximately 30 km/h as she rode up the incline toward McClure Road. There is also the evidence of Mr. Webb, which I found to be reliable, and the photographs and other evidence as to the position of the vehicles at the point of the collision, all of which support my conclusion stated above that Ms. Corbett in fact entered the intersection on a stale yellow light, or possibly even a red light. Assuming for the purposes of this analysis that the light was stale yellow, I conclude that Ms. Corbett was in a position to safely stop before entering the intersection. She did not do so, but instead "committed" and accelerated into the intersection, thus breaching the standard of care owed to others on the road.

[97] Moving beyond the decision to proceed into the intersection on what was at best a stale yellow light, I found above that Ms. Corbett committed not just to entering the intersection, but to going through it. Ms. Corbett did not have the right of way under s. 174, and her decision to accelerate to go through the intersection was in breach of her duty to drive with "due care and attention" and "reasonable consideration" for others.

(3.4.2) The Plaintiff's Conduct

- [98] Turning to Mr. Enns, I must once again first determine whether he breached the applicable standard of care by entering the intersection on the yellow light. I find that he did not. The light turned yellow before Mr. Enns reached the intersection. Thus, under s. 128(1)(a), he was obliged to stop at the yellow light unless he was unable to do so safely. I am satisfied based on his testimony - which was uncontroverted and basically unchallenged on this point - that when the light turned from green to yellow, he was near the intersection travelling at approximately 50 km/h, hence not in a position to stop safely before entering.
- [99] The next question insofar as Mr. Enns is concerned is whether he breached the standard of care expected of him by commencing his left turn onto McClure Road on a yellow light. Following the approach outlined in Nerval, Mr. Enns bears the burden of establishing that there was no immediate hazard in front of him at the time that he began his left turn. I find that Mr. Enns has met that burden. It is true that Mr. Enns did not see the defendant's truck heading southbound. I find that this is most likely because the truck was still a considerable distance from the intersection, and had not yet reached the top of the incline in the road leading up to McClure Road. From this position, Mr. Enns's view of the truck may well have been obstructed by one or more vehicles ahead of him in the northbound lanes of Gladwin Road, keeping in mind that the truck was still some distance from the intersection at this point. Given all of this, I find that there were no oncoming cars in or so near the intersection as to pose an immediate hazard when Mr. Enns initiated his turn.
- [100] My conclusion that Mr. Enns was not facing any immediate hazard within the meaning of s. 174 at the point when he commenced his left turn is not the end of the matter. Mr. Enns was also obliged under the combined effect of ss. 174 and 170 to signal his turn. There is a live issue in this case as to whether Mr. Enns signalled his turn, and if so, whether his failure to do so amounted to negligence.
- [101] There is no evidence that Mr. Enns did in fact engage his left turn signal before effecting the turn. Mr. Enns gave evidence that he geared down and checked for oncoming vehicles before commencing his turn, but gave no evidence either in chief or in cross-examination that he signalled his turn. There is no evidence from any other witness on this point, and no evidence from which I could infer that Mr. Enns engaged his left turn signal. I find that Mr. Enns did not signal.
- [102] I found above that Ms. Corbett's truck was not an "immediate hazard" within the meaning of s. 174. In this context, it is difficult to say whether, for the purposes of the obligation to signal under s. 170, traffic may have been "affected" by Mr. Enns's turn. On the one hand, Mr. Enns testified that that intersection was clear when he initiated his turn, and I accepted that evidence. On the other hand, it might be fair to say that traffic may always be "affected" by a left-turning vehicle at a relatively busy controlled intersection in an urban area.

- [103] There is little case law discussing the question of when traffic "may be affected" by a turning vehicle. In my view, s. 170 should be interpreted as establishing an objective standard. Even where a driver sees no traffic and thus forms a subjective belief that no one will be "affected" by the turn, there may well be others on the road whom the driver does not see. Thus prudence dictates that a driver should signal his or her turn signal in any circumstance where there are objective grounds to conclude that traffic may be affected. Whether traffic may be affected by a particular turn will depend on the circumstances present at the time, including the busyness of the road at the time, the nature of the road, the nature of the intersection, the time of day, and whether there is a dedicated turn signal.
- [104] Applying that analysis in the case at bar, the question is whether, in the particular circumstances in which Mr. Enns was intending to make a left turn, there was an objective basis to conclude that traffic may have been affected. It is relevant that there was no immediate hazard facing Mr. Enns when he commenced his turn, but that is not dispositive because under s. 170 a turning driver must signal whenever traffic "may be affected" by the turn. Mr. Enns was intending to make a left turn at a controlled intersection, in daylight hours, in a suburban area, at a time of day when traffic was relatively heavy. Looking at the matter objectively, I conclude that Mr. Enns breached the standard required under s. 170 of the MVA by failing to signal his turn.
- [105] Of course, breach of a statutory obligation does not necessarily amount to negligence. Once again there is room for debate. A case could be made for saying that when turning into a clear intersection, with no immediate hazards present, in daylight conditions with good visibility, failure to signal is not a breach of the standard of care, because no one could possibly be affected by it. On the other hand, it might fairly be said that even in the absence of any immediate hazard, a prudent driver would still signal a turn at a controlled intersection, simply because the turn may "affect traffic" in some unanticipated way. I will proceed on the assumption that Mr. Enns's failure to signal did amount to a breach of the relevant standard of care.
- [106] This brings us to the question of causation. To establish contributory negligence, the defendants must prove on a balance of probabilities that the plaintiff's failure to signal caused or contributed to the collision. As a general rule, the test for causation requires proof on a balance of probabilities that the loss or damage would not have occurred "but for" the negligent conduct. It must be shown that the conduct in issue was "part of the cause", even if that conduct alone was "not enough to create [it]": *Athey v. Leonati*, [1996] 3 S.C.R. 458 [*Athey*] at para. 17. This is a factual inquiry, under which the "but for" test must be applied in a "robust common sense fashion": *Clements v. Clements*, 2012 SCC 32 at para. 9.
- [107] In the context of a contributory negligence claim, the court must be satisfied that there were "a number of different negligent acts committed by different actors, each of which is a necessary or 'but for' cause of the injury". In such instances, the parties are held jointly liable, and the court apportions liability "according to the degree of fault of each defendant

pursuant to contributory negligence legislation": Clements at para. 12. That is the approach taken under s. 4 of the Negligence Act, R.S.B.C. 1996, c. 333 as discussed in *Chambers v. Goertz*, 2009 BCCA 358 at paras. 55-58. Where contributory negligence is found, then liability is apportioned based on degree of fault, rather than on any attempt at assessing the precise causative role played by each party found to be contributorily negligent.

- [108] In certain exceptional circumstances, the "but for" test of causation may not be appropriate, and proof of a "material contribution to risk" may be sufficient. In such cases, "[t]he material contribution to risk test substitutes proof of material contribution to risk for the requirement of 'but for' causation; it imposes liability, not because the evidence establishes the defendant's act caused the injury, but because the act contributed to the risk that injury would occur": *Singh v. Chand*, 2019 BCSC 932 at para. 110, citing Clements at para.13-16.
- [109] As Madam Justice Watchuk explained at para. 111 of *Singh*, the material contribution to risk approach should only be invoked in "exceptional circumstances", where the "but for" test is unworkable and potentially unfair. This might be the case where there are multiple tortfeasors and it is impossible to determine which of a number of negligent acts in fact caused the damage or injury. As McLachlin C.J.C. put it in Clements, "recourse to a material contribution to risk approach is necessarily rare, and justified only where it is required by fairness and conforms to the principles that ground recovery in tort".
- [110] In the case at bar, it is unnecessary to resort to the material contribution to risk approach, because the question of causation can be resolved using the conventional "but for" analysis. Ms. Corbett's conduct in entering the intersection on what was at best a stale yellow light, accelerating as she approached and entered the intersection was most certainly the principal cause of the collision. As for the role of Mr. Enns's failure to signal, I find it more likely than not that the collision would have occurred even if Mr. Enns had signalled his turn. I say that because (i) but for the failure to signal, Mr. Enns would have had the right of way, (ii) when he initiated his turn, the intersection was clear and there were no oncoming cars or immediate hazards in front of him, (iii) it was daylight and visibility was excellent, and (iv) Ms. Corbett did not testify that she saw Mr. Enns's vehicle and was uncertain or confused about whether it was turning. This is a situation where Ms. Corbett either did not see Mr. Enns's car at all until it was too late, or noticed it but decided to accelerate in hopes of getting through the intersection without incident. Either way, Mr. Enns's failure to signal was not a necessary part of the chain of events that caused the collision.

(3.4.3) Conclusion on the Issue of Liability

- [111] I conclude that Mr. Enns was not contributorily negligent. In the result, I find Ms. Corbett 100% responsible and liable for the collision. This conclusion is based on an analysis of the extent to which each party departed from the standard of care owed to others on the road, and the impact that each party's driving conduct had on the resulting collision. However, for the sake of completeness I will go on to explain why, in my view, this conclusion is consistent with the approach taken by the courts in other cases cited by the parties.
- [112] The case at bar bears some similarity to *Kokkinis v. Hall*, 1996 CanLII 2404 (B.C.C.A.) [Kokkinis], in which the defendant proceeded through a light that was "either red or in the late stage of amber", and struck the plaintiff's left-turning vehicle. The trial judge found the defendant liable for proceeding through the intersection when he did not have the right of way, but also found the plaintiff liable on the basis that she did not see the defendant's oncoming vehicle and therefore must have failed to keep a proper lookout. The Court of Appeal set aside the trial judge's apportionment of liability, reasoning that the plaintiff could not be faulted for failing to see the defendant's vehicle "until it was on top of her" and thus failing to recognize it as an "immediate hazard". The Court was not prepared to recognize a burden on the plaintiff, as the left-turning driver, to wait and see that all approaching drivers had stopped. The Court held the defendant 100% liable, noting that an amber light is "not a signal to accelerate".
- [113] In *Henry v. Bennett*, 2011 BCSC 1254 at para. 72, Madam Justice Ballance made the point that *Kokkinis* does not stand for the proposition that "left-turning drivers are entitled to proceed blindly on the assumption that oncoming drivers will obey the rules of the road, without regard to their concurrent obligation to act reasonably as the circumstances dictate". Rather, a left-turning driver is entitled to proceed on the assumption that oncoming drivers "would act in accordance with the law and come to a stop on the late amber, absent any reasonable indication to the contrary" and provided that the left-turning driver comports him or herself "with reasonable care".
- [114] The case at bar is similar to *Kokkinis* in that Ms. Corbett, like the defendant in that case, accelerated to proceed straight through the intersection on a light that was, at best, in the late stage of amber. Also, Mr. Enns, like the plaintiff in *Kokkinis*, evidently did not see the through-driving vehicle until after he was well into his left turn at which point it was, to use the language in *Kokkinis*, "right on top of" him and a collision was inevitable. Ms. Corbett, having accelerated and entered the intersection on a stale yellow light, breached the relevant standard of care expected of a driver in her position. In executing his left turn, Mr. Enns did not proceed blindly with no regard for his obligation to act reasonably as the circumstances dictated. He looked for oncoming traffic and, seeing none, initiated his turn. He did, however, fail to signal, a factor which was found ultimately to have no material bearing on the collision.
- [115] Counsel for Ms. Corbett argued that the case at bar is distinguishable from *Kokkinis* because in the case at bar Ms. Corbett entered on a fresh yellow, in circumstances where the left-turning driver, Mr. Enns, failed to keep a proper lookout for straight-through

vehicles before initiating his turn. I accept that no two cases are exactly alike, and I am wary of simply using the result in one case to determine the outcome in another. For this reason, case law is most important for its discussion of legal principles, rather than particular outcomes. Nonetheless, I cannot agree that the principle I have drawn upon in Kokkinis is inapplicable to the case at bar on the basis suggested by Ms. Corbett's counsel. On the findings of fact set out above, this is indeed a case where the straight through driver, Ms. Corbett, entered the intersection on what was, at best, a stale yellow light. In my analysis above, I found that Ms. Corbett did not have the right of way, and failed to yield to Mr. Enns's left-turning car. I further found that at the point when Mr. Enns commenced his left turn, there were no oncoming vehicles in or so near the intersection as to pose an immediate hazard. Accordingly, I cannot find Mr. Enns at fault for failing to see and react to Ms. Corbett's truck, which was still some distance away from the intersection when he commenced his turn.

[116] One factor which is present in the case at bar and which was not discussed in Kokkinis is the failure of the left-turning driver, Mr. Enns, to establish that he properly signalled his turn as required under ss. 170 and 171 of the MVA. I found above that Mr. Enns failed to meet the statutory obligation to signal his turn, and I proceeded on the assumption that this amounted to negligence on his part. However, I ultimately found it more likely than not that the collision would have occurred even if Mr. Enns had signalled his turn. Thus, the failure to signal was not a contributing cause of the collision.

(4) Damages

(4.1) Findings of Fact with Respect to Nature, Extent, and Duration of Injuries

[117] I make the following findings regarding the nature, extent, and duration of the plaintiff's injuries:

- a) In the immediate aftermath of the collision, Mr. Enns suffered from bruising and soft-tissue injuries to his neck, shoulders, elbows, and lower back. The pain in Mr. Enns's tailbone area also re-emerged shortly after the collision.
- b) The neck injury led to intense headaches that could last more than one full day, accompanied by nausea, dizziness, and blurring of vision. There was a period of time immediately after the collision when Mr. Enns had headaches of this sort eight to nine times per month.
- c) Mr. Enns's neck pain, low back pain, and tailbone pain have improved somewhat over time, but his recovery has now plateaued and he has reached "maximal medical recovery". He will experience ongoing pain, of moderate intensity and varying frequency, indefinitely. While his pain fluctuates in intensity and he has some days that are pain free, it can still be quite severe, especially during and after work days.

- d) The neck pain can also trigger headaches, of severe intensity, accompanied by nausea, dizziness, and sensitivity to light, lasting as long as one day at a time, about two or three times per month.
- e) With respect to the tailbone condition, cortisone injection treatment, which was previously effective in managing the condition, no longer affords Mr. Enns sustained relief. The only effective treatment or remedy at this point is use of a donut cushion while sitting. Mr. Enns is not a good candidate for tailbone surgery.
- f) The injuries have significantly disrupted Mr. Enns's sleep pattern.
- g) At some point within the first three years after the collision, Mr. Enns developed an "adjustment disorder" with low mood. His low mood will wax and wane with his physical symptoms.
- h) The injuries have affected Mr. Enns's disposition, in that his symptoms can make him angry, irritable, closed off, and worried. This has negatively affected his relationship with his wife.
- i) The injuries have affected Mr. Enns's lifestyle. He no longer engages in recreational pursuits like biking, golfing, or playing baseball. He is tense while driving and is no longer able to drive long distances without discomfort.
- j) The injuries have left Mr. Enns with a moderate degree of permanent disability affecting his work and, to a lesser extent, his activities of daily living.
- k) Mr. Enns is no longer suited to a career as an electrician, and is not competitively employable in occupations with medium or heavy strength demands. Even in occupations with light physical demands, he may require accommodations.
- l) Activities involving reaching, looking up, and awkward body positions are likely to aggravate his ongoing neck, low back, and tailbone pain.

(4.2) Causation with Respect to Plaintiff's Injuries

[118] Mr. Enns claims damages for, among other things, physical injuries to his neck, low back, and tailbone. The plaintiff's medical expert, Dr. Sangha, and the defendant's medical expert, Dr. Calvert, essentially agree that the subject collision was the cause of Mr. Enns's neck and low back injuries. They disagree, however, as to the effect of the collision on Mr. Enns's tailbone injury.

[119] The tailbone injury was clearly a pre-existing condition, but the question to be decided is how it was affected by the subject collision. For his part, Dr. Sangha opined that the tailbone injury was effectively re-activated, or in his words, "re-aggravated" by the collision. By contrast, Dr. Calvert opined that the tailbone injury re-emerged, or his words "restarted" in June 2016, independently of the collision.

- [120] Thus there is conflicting expert evidence on the issue of causation with respect to the tailbone injury. To resolve this issue, I find it necessary to briefly summarize four propositions of law concerning causation and damages.
- [121] First, the basic test for causation is that the plaintiff must demonstrate on a balance of probabilities that "but for" the tortious conduct of each defendant, the injuries suffered by the plaintiff would not have occurred: *Athey* at para. 14; *Resurface Corp. v. Hanke*, 2007 SCC 7 at para. 21; *Clements* at para. 8.
- [122] Second, where there are said to be causes for the plaintiff's injury other than the conduct of the defendants, including pre-existing conditions, the requirement for causation is made out where it is shown that the tortious conduct was a contributing cause to the plaintiff's injury. Thus although the "but for" analysis continues to apply in the sense that the plaintiff must show that he or she would not have suffered the injury "but for" the defendant's tortious conduct, the test can be met by proof that the defendant's tortious conduct was "a contributing cause" to the plaintiff's injury: *Athey* at paras. 12, 17. To sum it up in one phrase, "a defendant is liable for any injuries caused or contributed to by his or her negligence": *Athey* at para. 12.
- [123] Third, the law of causation provides that where the defendant's conduct is found to be a contributing cause of an injury, the defendant is liable and that liability is not reduced or apportioned due to the presence of other pre-existing conditions. Thus, the defendant tortfeasor is liable for the plaintiff's injuries even if those injuries are unexpectedly severe due to a pre-existing condition: *Athey* at para. 34.
- [124] Fourth and finally, insofar as pre-existing conditions are concerned, there is an important distinction between causation and damages as discussed in *Blackwater v. Flint*, 2005 SCC 58 at para. 78. On the one hand, for the purpose of the causation analysis the tortfeasor must take the victim as is, such that the tortfeasor is liable for all of the plaintiff's injuries even if they are unexpectedly severe due to a pre-existing condition: *Athey* at para. 34. On the other hand, when it comes to assessment of damages the law requires the tortfeasor to restore the victim to his or her original position, but no better position. The defendant "need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway": *Athey* at para. 35. Thus in assessing damages, it is the difference between the victim's "original position" prior to the tortious conduct, including any pre-existing conditions, and the victim's "injured position" after the tort that is used to measure the loss: *Athey* at para. 32.
- [125] Applying those principles to the evidence in the case at bar, the plaintiff's tailbone injury must be regarded as an unresolved pre-existing condition. Even if the subject collision had never occurred, the plaintiff's tailbone condition would have re-emerged at some point, probably as early as May or June 2016, when the effects of the cortisone injection administered by Dr. Page in November 2015 wore off.

[126] Yet it is also clear that after the collision, the plaintiff's pre-existing tailbone condition was no longer effectively manageable or treatable with cortisone injections. I accept the evidence of Mr. Enns that since the collision, further injections have not given any lasting relief from the pain in his tailbone area. I find that this is due in large measure to the effects of the collision. Dr. Sangha's mistaken assumption about the timing of the original tailbone injury undermines his opinion that the tailbone pain was reactivated or "re-aggravated" by the collision. Despite this, I accept Dr. Sangha's opinion that, given the high energies involved, leading to lower back injuries in and around the same anatomical area, it is more likely than not that the collision materially contributed to the plaintiff's subsequent continuing coccyx pain. I conclude that the subject collision had the effect of aggravating Mr. Enns's pre-existing tailbone injury.

[127] Of course, the plaintiff's pre-existing condition will be a relevant consideration in assessing damages. In fashioning a damage award that will restore Mr. Enns to his original, pre-collision position, the court must take into account that the tailbone injury would have been a continuing source of discomfort, albeit one that was manageable with treatment on an intermittent but continuing basis.

(4.3) Non-Pecuniary Damages

[128] Non-pecuniary damages are awarded to compensate the plaintiff for pain and suffering, loss of amenities, and loss of enjoyment of life to the extent that a financial award can achieve those things. The quantum of the award is determined not just by reference to a shopping list of the plaintiff's injuries in the abstract, but rather how those injuries have affected him, having regard to his age, circumstances, activities, relationships, and the like: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

[129] In this case, Mr. Enns was 28 years old at the time of the collision and is now 33. He had a pre-existing tailbone condition, but that condition was effectively managed by cortisone treatments, and was then aggravated by the effects of the collision. Mr. Enns was otherwise healthy and somewhat active. He suffered other transitory injuries but his principal concerns, the ones that continue to this day, are (i) neck pain, (ii) low back pain, (iii) aggravation of pre-existing tailbone pain, and (iv) an "adjustment disorder" with low mood.

[130] Mr. Enns's symptoms have improved somewhat over time, but he has ongoing chronic pain that is not expected to resolve and is made worse by certain activities and awkward body positions. He has recurrent headaches which can be debilitating. He has ongoing disruption of his sleep. While his pain fluctuates in intensity, and he even has some days which are pain free, it can still be quite severe, especially during and after work days. He is still young, and it is unlikely that he will experience significant improvement. His adjustment disorder will likely wax and wane with his physical symptoms, with some risk of deterioration.

- [131] Mr. Enns's injuries have significantly affected his life. He is less active and no longer enjoys the kind of recreational pursuits he did before the collision. He is irritable and his relationship with his wife has suffered. He has a permanent partial disability affecting his quality of life at work, moderately impairing some activities of daily living, and diminishing his capacity for some house and yard work.
- [132] I have been given case law as comparators by both the plaintiff and the defendants. I must bear in mind that although previously decided cases can give some guidance as to the general range of damages that might be considered fair and reasonable, the result in each case is largely fact-driven. My task is to determine the appropriate amount of compensation in this particular case, based on an individualized assessment of the plaintiff's loss.
- [133] With that qualification in mind, I find two of the cases cited by the plaintiff to be particularly apt, namely *Culver v. Skrypnik*, 2019 BCSC 807 and *Domil v. Cheung*, 2017 BCSC 65.
- [134] In *Culver*, the 37-year-old plaintiff suffered chronic back pain and sciatica. He also developed a somatic symptom disorder and major depression. He was unable to continue working as an oilfield technician, due to physical limitations and ongoing pain. After finding that the plaintiff's prospects of full recovery and a life free from pain were slight, the trial judge awarded \$175,000 in non-pecuniary damages. The plaintiff in *Culver* was older, but also more active and physically fit than Mr. Enns. Also, Mr. Enns had a pre-existing tailbone injury which, while treatable, was probably always going to require ongoing management despite the collision. I would say the loss suffered by the plaintiff in *Culver* was somewhat more substantial or aggravated than that of Mr. Enns, although as noted above no two plaintiffs are ever exactly alike.
- [135] The *Domil* case involved a 41-year-old female plaintiff who suffered soft tissue injuries to her neck, back, and shoulders. She eventually developed an adjustment disorder, anxiety, and a somatic symptom disorder. Her injuries were not expected to prevent her from returning to work as an accountant. Her physical condition was likely to improve over time, but the prognosis for her mental health was guarded. The trial judge awarded \$175,000 in non-pecuniary damages, which equates to \$183,000 in 2020 dollars.
- [136] The defendants cited two cases as comparators for non-pecuniary damages, *Basra v. Masood*, 2019 BCSC 2156 and *Lal v. Le*, 2016 BCSC 1324. I find these cases less helpful comparators, for the following reasons.
- [137] In *Basra*, the plaintiff was a 38-year-old self-employed tile setter who suffered soft tissue injuries to his neck, shoulders, and low back. These injuries resulted in severe pain, headaches, disrupted sleep, an adjustment disorder, and depression. He was off work and suffered considerably for several years, but his situation improved somewhat with rehabilitation. He was able to return to work, with some continuing disability. The trial judge, accepting that the plaintiff's pain was unlikely to completely resolve, awarded non-pecuniary damages of \$70,000. Although the plaintiff's injuries in *Basra* were similar in

many respects to those experienced by Mr. Enns, the court noted at para. 62 that damages are not based on the nature of the injuries alone, but rather an individualized assessment of the plaintiff's loss. The court also pointed out at paragraph 64 that the plaintiff's persisting pain did not prevent him from working in a relatively labour intensive job, his ongoing disability was "mild", his emotional symptoms had waned, and "his evidence about the impact of his disability on his lifestyle was vague".

[138] In *Lal*, the 33-year-old plaintiff suffered a variety of soft tissue injuries, most of which had resolved within a few months of the subject collision. The most significant injuries were a "moderate" soft tissue injury of the neck and a "moderate" muscular strain in the mid-back. The back pain was expected to resolve within one year of trial, but the plaintiff was expected to have "lingering" neck pain. The court's analysis in *Lal* focused primarily on the effect of the injuries on the plaintiff's work life, as that was the focus of the evidence at trial. With respect to the effect of the injuries on the plaintiff's lifestyle, the quality of the evidence was poor. Thus, the trial judge reasoned at para. 109 that:

Although Mr. Lal continues to experience pain symptoms from the injuries suffered in the accident, his activities, favourite pastimes, hobbies, relationships - all things that contribute to the enjoyment of life - appear to be mostly unaffected, at least based on what I heard at trial. On the other hand, Mr. Lal is a young man who will, based on the evidence, have some chronic pain symptoms permanently. It may not mean that favourite activities must be curtailed, but pain makes them less enjoyable.

These remarks appear to have had a significant bearing on the trial judge's award of \$50,000 for non-pecuniary damages.

[139] Having taken all the factors discussed above into account, and considering the range of damages discussed in the case law, my conclusion is that Mr. Enns should receive non-pecuniary damages of \$160,000. Of particular concern is Mr. Enns's age and poor prognosis. His recovery has plateaued and he is likely to have ongoing neck and low back pain of varying intensity, occasional severe headaches, and disrupted sleep for the balance of his life. The evidence of Mr. Enns and others who gave testimony on his behalf convinces me that these injuries have had, and will continue to have a significant bearing on his quality of life.

(4.4) Past Loss of Earning Capacity

[140] The principles applicable to a claim for past loss of earning capacity are the same as the principles considered in connection with a claim for loss of future earning capacity: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *Grewal v. Naumann*, 2017 BCCA 158 at para. 46, per Goepel J.A. in dissent, but with the concurrence of the majority on this point. The proper approach is: (i) to determine whether the plaintiff's earning capacity has been impaired to any degree by his injuries, and (ii) if so, to then assess the amount of damages for that impairment: *Perren v. Lalari*, 2010 BCCA 140 [Perren] at para. 19, quoting from *Southin J.A. in Earnshaw v. Despins* (1990), 45 B.C.L.R. (2d) 380 (C.A.) at p. 399.

- [141] Where the analysis calls for a consideration of hypothetical events, the plaintiff is not required to prove such eventualities on a balance of probabilities. Rather, what is required is a "real and substantial possibility", and not mere speculation: Grewal at para. 48, citing *Smith v. Knudsen*, 2004 BCCA 613 at paras. 29-31. Where a loss of capacity is established based on a hypothetical event, contingencies may have to be taken into account in the assessment of damages.
- [142] In this case, plaintiff's counsel submitted that if Mr. Enns had not been injured in the collision, he would not have lost his job at Excelsior, and he would have continued in that position up to the date of trial. This claim hinges on two distinct eventualities. The first is that, but for the collision and its effects, Mr. Enns would not have lost his job as an edge grinder at Excelsior. The second is that, if Mr. Enns had not lost his job when he did, he would have continued in that position up to the date of trial. I will consider each of these points in turn, with a view to determining whether the evidence meets the standard of a "real and substantial possibility".
- [143] With regard to the first plank of the plaintiff's position, I find that were it not for the effects of the collision, Mr. Enns would not have lost his job when he did. Mr. Enns had been working at Excelsior for some time leading up to the collision, without any evidence of apparent difficulty. He lost the job a mere two weeks after the collision, when he made a mistake while operating an edge grinder. I accept Mr. Enns's testimony that at the time he was unable to concentrate on his work because of soft-tissue pain, headaches, nausea, dizziness, and lack of sleep.
- [144] Moving to the second plank of the plaintiff's position, it is difficult to say with certainty that Mr. Enns would have continued working at Excelsior up to the date of trial. Mr. van den Berg opined that Mr. Enns would likely have continued working at Excelsior until he felt inclined to seek out more stimulating or rewarding work as an electrician. In fact, after losing the job at Excelsior, Mr. Enns worked at a few other jobs before leaving the workforce to complete his final two terms of electrician training. It is also difficult to ignore that since leaving Excelsior, Mr. Enns has worked at a variety of jobs, some for only brief periods of time, sometimes departing for reasons not directly related to his functional limitations. This implies an overall lack of stability in Mr. Enns's work history. Still, the evidence suggests that these jobs have been more physically demanding and less suitable for Mr. Enns than his pre-collision position at Excelsior.
- [145] Taking all of this into account, I do find a real and substantial possibility that, but for the collision, he would have continued in his job at Excelsior up to the date of trial. It was a good-paying job which he held for some time, and Mr. Enns had no apparent trouble doing the work. It will be necessary, however, to adjust the loss of past earnings award to account for the contingent possibility that even if Mr. Enns had not been injured in the subject collision, he might have left the job at Excelsior at some point over the past four years.

- [146] Having found a loss of past earning capacity, it is necessary to value the loss, using either the earnings approach or the capital asset approach. The earnings approach is generally more appropriate where there is an identifiable earnings history so as to be more readily quantifiable, whereas the capital asset approach is more suited to situations where the loss, though proven, is not "measurable in a pecuniary way": Perren at para. 12. In either case, damages are to be determined as an assessment and not a mathematical calculation, although economic data, statistics, or wage loss evaluations may be helpful tools: Grewal at para. 49.
- [147] I consider the earnings approach to be most appropriate in this case, because what is in issue is loss of income from a particular position with an identifiable history of earnings prior to the collision. At \$25 per hour, Mr. Enns's annualized salary at Excelsior was \$52,000. [1] When compared against Mr. Enns's actual income over the past four years, the total difference is \$72,372. I would reduce this figure by \$12,000, on account of the six months Mr. Enns spent away from the workforce to upgrade his education. Mr. Enns was not earning income during this time frame, but that was his choice, and also to his benefit in the sense that he was able to upgrade his knowledge and skills as an electrician. With a 20% adjustment for taxes, the after-tax value of the lost earnings would be \$48,000. I would reduce this figure by a further 25% to account for the contingent possibility that, even without the collision, Mr. Enns might have left his job at Excelsior for unrelated reasons. In the net result, I would award damages of \$36,000 for loss of past earning capacity.

(4.5) Loss of Future Earning Capacity

- [148] The legal principles governing this head of damages are comparable to those discussed under the preceding heading and need not be restated.
- [149] The two medical experts, Dr. Sangha for the plaintiff and Dr. Calvert for the defendants, basically agree that Mr. Enns has been left with permanent physical limitations as a result of his injuries. In particular, Dr. Sangha opines that Mr. Enns has "diminished physical and functional tolerances" in relation to repetitive or prolonged activities at or above shoulder level, activities that place strain on the neck including lifting, bending, pushing, and pulling, and activities that involve sustained postures. For his part, Dr. Calvert accepts as reasonable the conclusion that Mr. Enns has a permanent "partial disability" in relation to actions involving repetitive overhead lifting, reaching, crouching, ladder work, and heavy lifting.
- [150] The unchallenged expert report of Mr. McNeil confirms the plaintiff's functional limitations. Mr. McNeil concluded that the plaintiff is "not well suited" for the physical demands of work as an electrician, and his opportunities for work as an electrician are therefore limited. Mr. Enns can meet the strength demands of occupations involving light physical work, with some limitations and need for accommodation. He does not meet the strength requirements to perform work with medium or heavy physical demands.

- [151] Turning to the evidence of Mr. Enns, it is clear that despite his functional limitations, he has been able to obtain and hold a job as an apprentice electrician at Stellar Power. Mr. Enns experiences some limitations due to his injuries, but not to the point that he is rendered competitively unemployable in his current position. It must be noted that his work at Stellar Power is less demanding than other kinds of electrician work, as it is focussed principally on static assembly of electrical boxes at a workspace that does not require awkward body positions. Mr. Enns was laid off during COVID-19, but fully expects to be re-hired once the business starts up again.
- [152] Against this backdrop, the defendants fairly and reasonably concede that the plaintiff is entitled to damages for loss of future earning capacity. What is in issue between the parties is valuation of his loss.
- [153] The plaintiff's principal position is that the court should adopt an earnings approach. Counsel submits that the average salary for a fully qualified electrician is \$60,000 per year, which is \$18,000 more than the annualized income Mr. Enns earns at his current job. Counsel submits that the current value of Mr. Enns's total loss, over the course of his working life, would be some \$450,000, which counsel then proposes should be reduced by 10% on account of negative contingencies, for a damages award in the range of \$400,000.
- [154] I do not agree with plaintiff's counsel that this is a proper case for use of an earnings approach to value Mr. Enns's loss of future earning capacity. This is not a case where the plaintiff permanently lost a particular position with a particular income-stream due to his injuries. Mr. Enns has a job, which he fully expects to return to when the business re-opens, doing work as an apprentice electrician, and earning a reasonable wage.
- [155] I agree with the submission of the defendants that under the reasoning in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) [Brown], the value of what Mr. Enns has lost is best determined using the capital asset approach. Mr. Enns expects to return to a relatively well-paying job, but his injuries have rendered him less capable overall of earning income from various types of employment, he is less marketable to potential employers, and he has lost the ability to take advantage of all job opportunities that might otherwise have been open to him.
- [156] Relying on *Brown*, counsel for the defendants says damages equivalent to one year's salary as an electrician are sufficient to compensate Mr. Enns for his loss of earning capacity. However, given his relative youth, the nature of his limitations, and how they can be expected to impact his future opportunities, I consider an award equal to two years of income for an electrician to be necessary and reasonable compensation for the plaintiff's loss of future earning capacity.

[157] According to Mr. van den Berg, the median hourly wage for an electrician is \$27.50. This produces an annual salary ranging from \$52,800 to \$57,200, depending on the number of work weeks per year, but without overtime. Using the median figure of \$55,000, my conclusion is that Mr. Enns should receive \$110,000 in damages for loss of future earning capacity.

(4.6) Special Damages

[158] The defendants concede that Mr. Enns is entitled to special damages of \$3,980.84.

(4.7) Costs of Future Care

[159] I am guided by the summary of the law concerning costs of future care as set out in the following passage from *Gao v. Dietrich*, 2018 BCCA 372 at paras. 68 to 70:

[168] An award for damages for cost of future care is based on the principle of restitution. In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241-242, Dickson J., as he then was, explained the purpose of an award for cost of future care:

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in a position where he would have been in had he not sustained the injury. Obviously a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, "restitutio in integrum" is not possible. Money is a barren substitute for health and personal happiness but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of the claim.

[169] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 78, aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30. An award for future care must (1) have medical justification, and (2) be reasonable: *Milina* at 84; *Aberdeen* at para. 42.

[170] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, this Court clarified that the medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability, and recommended treatment, and the health care professional's recommended care item (at para. 39).

[160] The plaintiff submits that the cost of future care award should provide for (i) cognitive behaviour therapy sessions, (ii) prescription and non-prescription medications, (iii) physiotherapy or chiropractic treatments, (iv) ergonomic supports, and (v) consultation with a nutritionist and an exercise program. Each of these is addressed below under separate headings.

(4.7.1) Psychological Counselling

[161] Dr. Lu's report indicates that Mr. Enns requires continuing psychological counselling to help him cope with his chronic physical symptoms and psychological stressors. I find that this course of treatment is both medically justified and reasonable. Given Dr. Lu's opinion that as of the date of his report on 10 January 2020, Mr. Enns was in a "critical" period in managing his adjustment disorder, I consider it appropriate to make an award providing for 24 counselling sessions. Mr. van den Berg's report indicates that psychological counselling of this sort is available at a cost of \$120 to \$200 per hour. Using a median figure of \$160 per hour, I award a total of \$3,840 for costs of future psychological counselling.

(4.7.2) Medication

[162] The plaintiff also submits that the future care award should provide for prescription and non-prescription medication, specifically anti-depressants and pain medication. There is medical evidence from Dr. Lu indicating that Mr. Enns will require anti-depressants on an indefinite basis. With respect to pain medications, both Dr. Lu and Dr. Calvert opine that Mr. Enns is at risk of developing a dangerous dependency on opioids, so the award should not include costs of drugs like Tylenol-3. However, Mr. Enns has also been prescribed non-steroidal anti-inflammatories for management of his pain, and I infer that he would continue to benefit from these drugs, given that his symptoms are expected to continue indefinitely.

[163] I accept the plaintiff's position that the cost of these drugs can be ascertained from the schedule of special damages admitted into evidence. It comes out to \$600 per year. Using the multiplier of 23.4683 found at Table E of the Civil Jury Instructions, the present-value cost of these treatments until Mr. Enns reaches 65 years of age is \$14,080.

(4.7.3) Physiotherapy, Chiropractic Treatments, and Massage Therapy

[164] Mr. Enns further submits that the costs of future care award should include "intermittent access" to physiotherapy, chiropractic treatment, and massage therapy. Mr. Enns testified that he did not realize any benefit from massage therapy, and no medical justification has been provided for future treatment of this sort.

[165] With respect to physiotherapy and chiropractic treatments, Mr. Enns testified that he has tried both and prefers the latter over the former. He considers chiropractic treatment to be most effective for managing his neck and back injuries.

[166] Neither of the medical experts, Dr. Sangha or Dr. Calvert, expressly listed ongoing physiotherapy or chiropractic treatment as part of Mr. Enns's future care plan in their expert reports. However, Dr. Sangha's report recommends multi-pronged intervention for treatment of myofascial impairment, hypertonicity, deconditioning, and central sensitization. In cross-examination, Dr. Sangha accepted that physiotherapy treatments can be effective in combatting central sensitization. His report also states that Mr. Enns has previously "been to a chiropractor for physiotherapy", from which I infer that these can be

viewed as alternative forms of treatment for Mr. Enns's injuries. On the basis of this evidence, I am satisfied that treatment of this sort is medically justified.

[167] Mr. Enns has expressed a preference for chiropractic treatment over physiotherapy. As between the two, it is evident from the schedule of special damages that the cost is more or less the same, at \$50 per session. With respect to the frequency of treatment, Mr. Enns testified that he currently sees his chiropractor once per week. I would not characterize this as "intermittent access" as contended for in the plaintiff's submissions. In my view, one chiropractic treatment per month would be reasonable on the evidence before me. At \$50 per session, this again comes out to \$600 per year. Once again using the multiplier in the Civil Jury Instructions, the present-value cost of these treatments until Mr. Enns reaches 65 years of age is \$14,080.

(4.7.4) Ergonomic Supports

[168] The plaintiff seeks an award for "ergonomic supports", relying on Mr. van den Berg's report, which states that Mr. Enns would likely benefit from ergonomic equipment "including a sit-stand desk, ergonomic chair, computer monitor stand, and telephone headset". However, there is no evidence that Mr. Enns requires any of this equipment for work purposes, or that he requires this equipment to support his home computer use. Home computers are ubiquitous and I readily infer that they are present and used regularly in virtually every household in the province. However, I have no evidence that Mr. Enns uses a computer to such an extent that he would derive any practical benefit from computer-related ergonomic supports. The evidence does not satisfy me that these items are medically necessary or reasonable.

(4.7.5) Nutritionist, Exercise Program

[169] Finally, Mr. Enns submits that the costs of future care award should provide for consultation with a nutritionist, and an exercise program with access to aquatic facilities. Although there is medical evidence to support the submission that Mr. Enns would benefit from both dietary counselling and a regular exercise program, the plaintiff has not tendered evidence to show the costs of such measures. With respect to dietary counselling, I expect that there are many public and free resources that would be available to Mr. Enns, and in the absence of evidence about costs, I am not satisfied that it is medically necessary or reasonable to award damages to pay for such things. With respect to exercise, the medical experts are clearly of the view that Mr. Enns has experienced deconditioning and weight gain and would benefit from regular exercise. However, I do not see it as reasonable to award damages for such matters in the absence of any effort by the plaintiff to identify a particular program and provide evidence as to costs.

(4.7.6) Conclusion on Costs of Future Care

[170] I award a total of \$32,000 in damages for costs of future care.

(4.8) Failure to Mitigate Damages

- [171] The defendants allege that Mr. Enns failed to mitigate his damages by declining to pursue courses of treatment recommended by his medical advisors. Specifically, the defendants point to evidence that Mr. Enns did not follow the advice of Dr. Page to obtain psychological counselling, and did not consistently attend physiotherapy treatments as recommended by both Dr. Page and Dr. Dhingra.
- [172] Where a failure to mitigate damages is alleged, the burden is on the defendant to prove on a balance of probabilities that (i) the plaintiff acted unreasonably, and (ii) the extent to which the plaintiff's damages would have been reduced had he or she acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57. Where determination of the amount that the plaintiff's damages would have been reduced involves a consideration of a "hypothetical" eventuality, the defendant must establish a "real and substantial possibility" that such an outcome would have materialized. If that is established, the court will "assess the degree of probability that the loss or some part thereof would have been avoided, and assess damages accordingly": *Basra* at para. 121 citing *Forghani-Esfahani v. Lester*, 2019 BCSC 332 at para. 60-69.

(4.8.1) Counselling

- [173] The evidence indicates that at a medical appointment on 9 May 2016 - a mere ten days after the collision - Dr. Page gave Mr. Enns a written referral for counselling services. In his trial testimony, Mr. Enns explained that at this point in time he did not feel emotionally ready for counselling because of a number of stressors in his life. Mr. Enns did not obtain any counselling until December 2016, when he attended two "informal" counselling sessions with Mr. Solla, a family friend. Commencing in June 2018, Mr. Enns obtained counselling from Mr. Solla on a more formal and consistent basis, continuing up until the end of 2019, after which treatment was disrupted by COVID-19 restrictions.
- [174] In his report dated 10 January 2020, Dr. Lu diagnosed Mr. Enns with an adjustment disorder, low mood, and some symptoms of clinical depression. Dr. Lu's recommended course of future treatment includes 12 to 24 cognitive behaviour therapy sessions with a trained counsellor. Dr. Lu was unable to give an opinion on when the adjustment disorder materialized. In cross-examination, Dr. Lu agreed that early intervention or engagement with a therapist could reduce the severity of a psychological condition, but added that delay in treatment of psychological conditions is common. Dr. Lu went on to explain the reluctance of patients to seek help due to the stigma associated with mental health conditions.
- [175] Against this backdrop, the first question is whether the evidence proves on a balance of probabilities that Mr. Enns acted unreasonably in failing to pursue counselling at the earliest opportunity, or with the degree of commitment reasonably expected in these circumstances. The law instructs that where medical treatments are concerned, the court must take into account the plaintiff's personal circumstances or "context" in deciding the

reasonableness of his or her conduct: *Gill v. Lai*, 2019 BCCA 103 at paras. 26; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 203; *Rozendaal v. Landingin*, 2013 BCSC 24 at paras. 72-73.

- [176] Considering the plaintiff's conduct in light of his personal context, the evidence does not satisfy me that he acted unreasonably in regards to psychological counselling. I accept Mr. Enns's testimony that when he first received a referral for counselling, he did not act on it immediately because he did not feel emotionally ready. Mr. Enns did seek treatment, albeit informally at first, and later attended counselling on a more consistent basis. I must consider this course of conduct in light of the evidence of Dr. Lu that delays in seeking out mental health treatment are quite common, considering the stigma associated with such conditions. It is also the case that patients facing mental health challenges sometimes lack insight or fail to recognize the extent of their need for help. It is noteworthy in this regard that Dr. Lu was unable to say precisely when Mr. Enns actually developed an adjustment disorder. For all of these reasons, the evidence does not establish that Mr. Enns failed to act reasonably by responding to the recommendation for psychological counselling in the manner that he did.

(4.8.2) Physiotherapy

- [177] The evidence indicates that at the appointment with Dr. Page on 9 May 2016, Mr. Enns received a written referral for physiotherapy. Mr. Enns testified that he was not able to access physiotherapy services during the time that he was in 100 Mile House in the summer of 2016. He returned to the lower mainland later in the summer of 2016, but did not commence physiotherapy until January 2017.
- [178] Commencing on 17 January 2017, Mr. Enns attended physiotherapy sessions once every week or two for several months. In his trial testimony, Mr. Enns said he received a variety of treatments at his physiotherapy sessions, including weight training, ultrasonic treatment, acupuncture, and dry needling.
- [179] There is evidence that on a number of occasions between May 2017 and February 2018, Mr. Enns told Dr. Dhingra that he was continuing with physiotherapy when in fact he was not. At trial, Mr. Enns disputed the accuracy of some of Dr. Dhingra's records, explaining that he was not in a position to recall with any certainty or precision exactly what was said during these appointments. However, at some points in his testimony he appeared to concede that he told Dr. Dhingra he was attending physiotherapy sessions during time periods when the admissions of fact indicate that he was not doing so. Mr. Enns's explanation for this discrepancy was that in his mind he was still attending physiotherapy, but might not have been able to go from time to time because of his work schedule.

- [180] Mr. Enns also testified that he did home-based exercises and stretches, including the use of weights and resistance bands as recommended by his physiotherapist, which he considered to be a form of physiotherapy. Mr. Enns's mother testified that during the time he was living with her, she saw him do exercises and stretches at home. When asked to give specifics, Ms. Enns referred to stretching but did not describe any particular kind of exercises.
- [181] At medical appointments on 21 March 2018 and 2 February 2019, Dr. Dhingra recommended that Mr. Enns continue with physiotherapy. Mr. Enns did not do so. He testified that he did not see fit to pay for treatment that was not giving him lasting results.
- [182] Dr. Sangha agreed in cross-examination that when physiotherapy is recommended for treatment of collision-related injuries, it is generally better to begin the treatment earlier, before the patient begins to experience secondary muscle or joint changes, fear and pain avoidance, deconditioning, or central sensitization. Dr. Sangha acknowledged a real possibility that timely physiotherapy could reduce or prevent central sensitization.
- [183] Turning to the legal analysis, once again the first question is whether the evidence proves on a balance of probabilities that Mr. Enns failed to act reasonably by not pursuing physiotherapy treatments as recommended by his doctors. Mr. Enns testified that he did in fact attend physiotherapy from time to time, but that he did not realize any benefit. He also testified that he felt he was attending treatment but was unable to go from time to time because of work commitments, and that he was doing exercises and stretches at home, which he considered to be a form of physiotherapy. Finally, Mr. Enns expressed concern about the costs of physiotherapy.
- [184] None of these explanations are convincing in light of the other objectively reliable evidence in the record. Mr. Enns was experiencing a variety of symptoms associated with soft tissue injury and there is uncontroverted evidence that Mr. Enns was referred to physiotherapy on multiple occasions for treatment of his injuries. He only attended sporadically and indeed there is evidence that Mr. Enns told his doctors he was going to regular physiotherapy treatments during periods when he clearly was not doing so. In his testimony, Mr. Enns expressed concern about the cost of physiotherapy but the evidence does not show that the treatment was in any way cost-prohibitive. For much of the time periods in issue, Mr. Enns attended weekly chiropractic treatments at a cost that was comparable to the costs of physiotherapy sessions.
- [185] I conclude that Mr. Enns did not act reasonably in failing to pursue physiotherapy as recommended by his doctors, and in informing the doctors that he was attending such treatments during periods of time when he was not.
- [186] This brings me to the second stage of the legal analysis. The burden is on the defendants to establish the extent to which the plaintiff's damages would have been reduced had he pursued the course of physiotherapy treatments recommended by his doctors. In his physical examination of Mr. Enns on 16 November 2019, Dr. Sangha saw indications of myofascial impairment, hypertonicity, deconditioning, and central sensitization. In his viva

voce testimony, Dr. Sangha accepted that when physiotherapy is recommended for treatment of collision-related injuries, it is generally better to begin the treatment earlier, before the patient begins to experience secondary muscle or joint changes, fear and pain avoidance, deconditioning, or central sensitization. Dr. Sangha also acknowledged a real possibility that timely physiotherapy could reduce or prevent central sensitization.

- [187] It might be argued on behalf of Mr. Enns that while he did not attend physiotherapy treatments as recommended, he did attend a number of physiotherapy sessions without realizing any benefit. He also pursued other, alternative courses of therapy including chiropractic treatments. However, the fact is that Mr. Enns was specifically and repeatedly referred to physiotherapy, which offers a range of treatments and modalities that is broader than those offered by a chiropractor. The expert evidence indicates that timely physiotherapy can make a realistic difference for a person at risk of developing central sensitization. Mr. Enns did not continue with physiotherapy despite the recommendations of his doctors. The question is whether that could reasonably be expected to have made a difference in terms of the severity of his ongoing symptoms.
- [188] On the basis of this evidence, I conclude that there is a real and substantial possibility that, but for Mr. Enns's failure to attend physiotherapy treatments as recommended by his doctors, his central sensitization condition would not have progressed to the level observed by Dr. Sangha. In other words, there is a real and substantial possibility that Mr. Enns would not have been left in a position causing him to experience greater sensitivity and diffusion of pain than might normally be expected for the kind of injuries he sustained.
- [189] Although I am satisfied that Mr. Enns's failure to pursue recommended treatment might realistically have made a difference, it is still difficult to quantify the extent of the difference in his condition. The evidence does not rise to the level of showing that more timely and consistent physiotherapy would have completely resolved Mr. Enns's injuries. The defendants have established a reasonable likelihood that such treatment would have reduced the severity of Mr. Enns's central sensitization condition. Finally, the evidence does not establish that additional timely physiotherapy would have had any appreciable impact on the extent of Mr. Enns's ongoing functional limitations. Considering all of this against the backdrop of the plaintiff's injuries as a whole, I would reduce the award for non-pecuniary damages and costs of future care by 10% on account of the failure to mitigate.

(4.9) Summary of Damages Award

[190] In summary, my determination of damages is as follows:

Non-Pecuniary Damages

\$ 160,000.00

Past Loss of Earning Capacity

\$ 36,000.00

Loss of Future Earning Capacity

\$ 110,000.00

Costs of Future Care

\$ 32,000.00

Special Damages

\$ 3,980.84

Subtotal

\$ 341,980.84

Reduction for Failure to Mitigate

Reduction of Non-Pecuniary Damage award

(\$ 160,000 x 10%):

(\$ 16,000.00)

Reduction of Costs of Future Care award

(\$ 32,000 x 10%):

(\$ 3,200.00)

TOTAL DAMAGES:

\$ 322,780.84

[191] Judgment is granted in the plaintiff's favour and damages are awarded in the amount of \$322,780.84.

(5) Costs

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

"Riley J."

- [1] This figure is based on a 40 hour work week, with 52 work weeks in the year. Both parties appeared to accept these parameters for the purposes of determining Mr. Enns's loss of earning capacity.
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CASE PAGE <https://chat.esheria.ai/case-law/canada/enns-v-corbett-2020>

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