

CANADA / JUDGMENT

Ziauddin v. Kuang

2022 BCSC 386

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 386 Ziauddin v. Kuang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ziauddin v. Kuang,

2022 BCSC 386

Date: 20220310

Docket: M178185

Registry: Vancouver

Between:

Ahmad Farid Ziauddin

Plaintiff

And

Xue Juan Kuang and Huiping Zhong

Defendants

- and -

Docket: M178186

Registry: Vancouver

Between:

Ahmad Farid Ziauddin

Plaintiff

And

Bum Chul Joo

Defendant

- and -

Docket: M178198

Registry: Vancouver

Between:

Ahmad Farid Ziauddin

Plaintiff

And

Forest Lee, Pei-Chi Peggie Lee and Hyundai Capital Lease Inc.

Defendants

- and -

Docket: M1813039

Registry: Vancouver

Between:

Ahmad Farid Ziauddin

Plaintiff

And

Sayed Hussein Ahmadi and Sayed-Ahmad Ahmadi

Defendants

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Justice MacNaughton

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

September 27-29,

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Place and Date of Judgment:

Vancouver, B.C.

March 10, 2022

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Introduction

- [1] When Ahmad Farid Ziauddin was between the ages of 24 and 25, he was injured in four motor vehicle accidents within a 14-month period. The accidents were on November 12, 2015, January 5 and May 10, 2016, and January 7, 2017. In these reasons I will refer to the accidents as MVAs 1-4.
- [2] Mr. Ziauddin was driving his mother's vehicle in MVAs 1 and 2. By MVA 3, she had transferred her vehicle into his name. The vehicle was written off after MVA 3. In MVA 4, Mr. Ziauddin was a passenger in a vehicle owned by Sayed-Ahmad Ahmadi and driven by his son, Sayed Hussein Ahmadi. I will refer to the driver as Mr. Ahmadi and the owner as Mr. Ahmadi Sr. Mr. Ziauddin was wearing a seat belt in each accident.
- [3] In four separate actions, Mr. Ziauddin seeks non-pecuniary and special damages, and awards for past income loss, loss of future earning capacity, and the cost of future care. At trial, the parties agreed to the quantum of Mr. Ziauddin's special damages claim.
- [4] In the actions relating to MVAs 1-3, the defendants admitted liability.
- [5] The defendants in the action relating to MVA 4 were served with the notice of civil claim. Mr. Ahmadi was personally served on December 19, 2018, and Mr. Ahmadi Sr. was served, pursuant to an order for alternative service, on January 14, 2020. Neither responded to the claim nor appeared at trial. In addition, despite being personally served with a subpoena by counsel for Mr. Ziauddin, who intended to call him as an adverse party witness, Mr. Ahmadi did not appear at trial.
- [6] The Insurance Corporation of British Columbia ("ICBC") added itself as a third party to the action relating to MVA 4, pursuant to s. 77(3)-(4) of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231. By doing so, it was entitled to contest the defendants' liability, and the damages claimed by Mr. Ziauddin, as if it were a defendant in the action. Liability is denied for MVA 4. Alternatively, ICBC says Mr. Ziauddin was contributorily negligent.
- [7] ICBC adopted the damages submissions of counsel for the defendants in MVAs 1-3. In its closing submissions, ICBC only addressed liability and contributory negligence for MVA 4.

Reliability and Credibility

- [8] In this case, the defendants have raised questions about the reliability and credibility of Mr. Ziauddin's evidence and, to a lesser extent, the witnesses he called. There is, of course, a distinction between reliability and credibility. In addition, certain principles have developed and are applicable, in personal injury actions, to assessing subjective descriptions of injury that are not capable of being confirmed by objective evidence.
- [9] Some of these evidentiary principles were helpfully summarized by Justice Skolrood in *Radacina v. Aquino*, 2020 BCSC 1143:
- [92] Numerous authorities have discussed the principles governing the assessment of credibility: see in particular *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356-357 (B.C.C.A.); *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 185-87, *aff'd* 2012 BCCA 296, leave to appeal *ref'd* [2012] S.C.C.A. No. 392. In *Bradshaw*, Madam Justice Dillon held that conflicting testimony should be assessed in light of the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (at para. 187, citing *Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Q.B.)).
- [93] In addition to the approach advanced by Justice Dillon in *Bradshaw*, Justice Abrioux, as he then was, in *Karim v. Li*, 2015 BCSC 498 at para. 89, identified a number of principles that may inform the court's approach in cases in which there is an absence of objective medical findings or where those findings are out of proportion to the symptoms claimed:
- no one can expect compensation in the absence of convincing evidence that complaints of pain are true reflections of a continuing injury: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399 (S.C.);
 - every injured person has a different understanding of his or her own complaints and injuries and it falls to judges to translate injuries to damages: *Price* at 397;
 - where there is little or no objective evidence of continuing injury and where complaints of pain persist for long periods extending beyond the expected resolution, the court should be exceedingly careful to assess assertions in light of the surrounding circumstances including the medical evidence: *Price* at 399; *Tai v. De Busscher*, 2007 BCCA 371 at para. 41;
 - it is the doctor's function to take the patient's complaints at face value and offer an opinion based on them and it is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room: *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, *aff'd* 2012 BCCA 114; and

- in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries: *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1127 at para. 73, *aff'd* 2011 BCCA 516.

[10] Justice Skolrood went on to explain the distinction between credibility and reliability:

[94] Credibility refers to the veracity of a witness's testimony whereas reliability is concerned with the accuracy of the testimony: *R. v. Morrissey* (1995), 22 O.R. (3d) 514 at 526 (C.A.).

[95] The distinction is well summarized by the Ontario Court of Appeal in *R. v. H.C.*, 2009 ONCA 56 at para. 41:

Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately

i. observe;

ii. recall; and

iii. recount

events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrissey* (1995), 22 O.R. (3d) 514, at 526 (C.A.).

[96] Credibility and reliability are not all or nothing propositions. A trier of fact may believe all, part or none of a witness's evidence, and may attach different weight to different parts of a witness's evidence: *R. v. R. (D.)*, [1996] 2 S.C.R. 291 at para. 93; *R. v. Howe* (2005), 192 C.C.C. (3d) 480 at para. 44 (Ont. C.A.).

[11] It is with these concepts in mind that I will consider the evidence in this case.

Mr. Ziauddin's Background

Early Life

[12] Mr. Ziauddin was born in Afghanistan on March 28, 1991. He is the oldest of five brothers, the youngest of whom is nine years younger. When he was quite young, his parents left Afghanistan for Iran, where they stayed for about four or five years. From there, the family moved to Uzbekistan, where they stayed for about seven years, before immigrating to Vancouver in about 2006. Mr. Ziauddin was about 15 years old when the family moved to Vancouver.

- [13] Mr. Ziauddin's first language is Farsi. His early schooling was in Russian and Uzbeki. He did not speak any English when he arrived in Vancouver and entered Grade 11. He had done well in school before coming to Canada but, due to his lack of English, he did not do well and was required to repeat Grade 11. He never graduated from high school.
- [14] Following high school, Mr. Ziauddin worked part time at various low paying jobs. He worked at a gas station, as a pizza delivery driver, as a cashier, and doing volunteer landscaping with a friend. He also generally helped around the house, did the grocery shopping and the laundry. His primary focus was on elite soccer.
- [15] On a date that was not clear in the evidence, but appears to have been just before MVA 1, Mr. Ziauddin began working in construction, installing siding.

Involvement with Soccer

- [16] Mr. Ziauddin played in the Coquitlam, Burnaby, and Vancouver soccer leagues, often practicing three times a week and playing on weekends. He testified that he played about ten hours a week. In addition to his league play, Mr. Ziauddin was recruited to play for the Afghan Select team which played teams from other Arab countries in what was referred to as the Muslim League.
- [17] Mr. Ziauddin testified that he hoped to play professional soccer, become a soccer coach, or open a soccer training academy. All of his brothers were also soccer players.
- [18] During the trial, on behalf of Mr. Ziauddin, I heard evidence from David Ahmadyar, who coached the Afghan Select team for 15 or 16 years. He coached Mr. Ziauddin's team from 2011 to 2014 or 2015. The Afghan Selects are select division 1 players from teams around the Lower Mainland. During the summer, the team played three times a week.
- [19] Mr. Ahmadyar described Mr. Ziauddin as one of his best players. In 2011, Mr. Ziauddin was chosen, out of 40-50 Afghan Select players, to captain the team. Mr. Ahmadyar said that in addition to his strong running skills and skills with the ball, Mr. Ziauddin had leadership qualities and excellent social skills. Mr. Ziauddin had no memory issues and understood the rules of play.
- [20] I also heard evidence from Ali Kazemi, who met Mr. Ziauddin through the Afghan Select team. They played competitive soccer together until approximately 2014 or 2015. In the summer months, which was peak season, they played five or six times a week. Mr. Kazemi testified that "soccer definitely came first" as "we weren't in full-blown careers like we would be now".
- [21] Mr. Kazemi is a few years older than Mr. Ziauddin, but he travelled and socialized with him when they played tournaments outside of BC. He described Mr. Ziauddin as a tall, slim fellow, who was fast, physical, highly motivated, and who kept up with everyone. He said that Mr. Ziauddin was very outgoing.

- [22] Rashid Ziauddin, Mr. Ziauddin's brother, and the middle son of the five boys, testified that Mr. Ziauddin was very athletic growing up; he had dreams of playing soccer and was very dedicated. Rashid described Mr. Ziauddin as always being on the go and as very outgoing.
- [23] Mr. Kazemi testified that Mr. Ziauddin played high-level soccer until at least the summer of 2015, only months prior to MVA 1. Rashid testified that all the Ziauddin brothers played competitive soccer and had a goal of making it as far as they could, with the hope of opening a soccer academy together. One of the brothers had a soccer scholarship. He described Mr. Ziauddin as a role model.

The Death of Mr. Ziauddin's Father

- [24] Mr. Ziauddin's father, and the primary support for the family, passed away suddenly when Mr. Ziauddin was 22 or 23 years old. Because Mr. Ziauddin was the oldest son, and the only member of the family who had a driver's licence, he assumed responsibility for driving his brothers to soccer, school, appointments, and other events. All of the brothers played elite-level sports. Mr. Ziauddin said that he was under a lot more pressure at home after his father's death.
- [25] Mr. Ahmadyar confirmed Mr. Ziauddin's evidence that, after his father's passing, Mr. Ziauddin took over his father's role and drove his brothers to and from games.
- [26] Rashid, who was also a skilled soccer player, confirmed that after their father's death, Mr. Ziauddin assumed more responsibilities, including driving the brothers wherever his father used to drive them.

The Circumstances of MVA 1

- [27] MVA 1 took place on November 1, 2015. Mr. Ziauddin testified that he was driving on the Kingsway, in light rain, when the side of his car was hit by a car in an adjacent lane, travelling in the same direction as he was.
- [28] In their response to civil claim, Xue Juan Kuang and Huiping Zhong admitted liability for the accident, which occurred when a car owned by Xue Juan Kuang, and driven by Huiping Zhong, was travelling northwest on the Kingsway, at or near the intersection of Wilson Avenue in Burnaby. Mr. Zhong attempted to change lanes and collided with Mr. Ziauddin's vehicle.
- [29] Neither defendant testified.

The Circumstances of MVA 2

- [30] MVA 2 occurred on January 5, 2016. Mr. Ziauddin testified that it occurred in Como Lake. He was not sure where he was coming from but said he was proceeding straight through a green light when a driver, who did not stop at a stop sign, hit his car from the side.

- [31] Bum Chul Joo admitted liability for the accident in his statement of defence. He agreed he was travelling west on Ridgeway Avenue and proceeded through a stop sign at the intersection of Blue Mountain Street in Coquitlam, BC. He struck Mr. Ziauddin's vehicle, which was travelling north on Blue Mountain Street. The police ticketed Mr. Joo for an unsafe left turn.
- [32] Mr. Joo testified that the "impact was quite - quite big". His vehicle spun 180 degrees as a result of the collision and Mr. Ziauddin's vehicle came to a complete stop. He thought that Mr. Ziauddin was travelling at about 60 or 65 kph at the point of collision. He described that the left side of Mr. Ziauddin's front bumper was pushed in, touching his left tire. Mr. Joo described the significance of the impact to his vehicle and said "my rear frame was totally bend and my bump - my rear bumper was totally dropped off, so my car was total lost".
- [33] Mr. Joo was able to drive his car away from the collision, but Mr. Ziauddin had to call a tow truck.
- [34] Mr. Joo approached Mr. Ziauddin after the accident to see if he was okay, and Mr. Ziauddin responded that "he was fairly okay". Mr. Joo also said that he did not notice that Mr. Ziauddin had any difficulty walking.

The Circumstances of MVA 3

- [35] MVA 3 occurred on May 10, 2016. Mr. Ziauddin testified that he was at a red light and was making a left turn when he was hit from the side by another car. He said the collision was "really loud" and "really bad", and the "whole car just shook".
- [36] In their response to civil claim, the defendants admitted liability for MVA 3. They admitted that Mr. Lee, the driver, was travelling south on Canada Way in a vehicle owned by Ms. Lee and Hyundai Capital Lease Inc. Mr. Lee attempted to make a right turn, to proceed westbound on Burris Street. He struck Mr. Ziauddin's vehicle, which was travelling northbound on Canada Way, and was turning westbound on to Burris St., with an advanced green arrow.
- [37] Mr. Lee testified that he was making a right turn on a red light and, after he turned the corner, there was an impact, which he confirmed was "pretty severe". He said that "his car went up on two wheels on the right side. Like, I felt it left the ground". Both Mr. Lee and his grandfather, a passenger in the vehicle, hit their heads on impact. The damage to his vehicle was assessed at approximately \$5,000.
- [38] The car Mr. Ziauddin was driving was written off after MVA 3.
- [39] Mr. Ziauddin testified that prior to MVA 4, he had not recovered from the injuries he suffered in the earlier accidents. He still suffered from back, neck and knee pain, although his knee pain was intermittent.

The Circumstances of MVA 4

[40] MVA 4, which occurred on January 7, 2017, was the most serious. As set out, ICBC denies that Mr. Ahmadi was liable for the accident and, alternatively, submits that Mr. Ziauddin was contributorily negligent.

Mr. Ziauddin's Evidence

- [41] Mr. Ziauddin testified that on the night of MVA 4, he had been out, and was planning to go home, when he ran into Mr. Ahmadi. Mr. Ziauddin and Mr. Ahmadi lived in the same apartment complex, and Mr. Ziauddin knew him as "Hussein". They were acquaintances rather than friends.
- [42] Mr. Ahmadi was driving a pickup truck that Mr. Ziauddin had seen him drive before. Mr. Ziauddin had been in the truck with Mr. Ahmadi on at least one prior occasion, and he thought it belonged to Mr. Ahmadi. Mr. Ahmadi wanted to hang out, and they decided to go to a viewpoint in a parking lot on top of Burnaby Mountain. It was snowing and cold. The viewpoint was approximately a 30-45 minute walk from anywhere. Mr. Ziauddin testified that there were two other passengers in the rear seat of the vehicle, one of whom was Samim Salam.
- [43] Mr. Ziauddin testified that he did not remember much about the circumstances of MVA 4. He said he was a front seat passenger in the vehicle. He remembered that they were parked in front of the view, and that he was smoking with his arm hanging outside of the car. The next thing he remembered was Mr. Ahmadi backing up at some point and he saw, or felt, that the car was going to "land on his arm, so he pulled his hand back inside".
- [44] The next thing Mr. Ziauddin remembered was waking up to someone slapping his face. He was hanging sideways in the vehicle, being held up by his seatbelt. Someone opened his seatbelt, and he fell and hit his head again. He testified that "everybody was there except him" (referring to Mr. Ahmadi).
- [45] Mr. Ziauddin did not recall details of being transported to the hospital, how long he was there, or how he left it. He recalled the light bothering him when he left the hospital and that he was very tired. He testified that he still suffers from light sensitivity and he gets a headache from it.
- [46] In cross-examination, Mr. Ziauddin agreed that, after leaving the hospital, and before going home, he stopped and bought new clothes as his clothes from the night before were covered in blood. He explained that he did so because he did not want to upset his mother and family by showing up covered in blood.

Samim Salam's Evidence

- [47] Mr. Salam was a rear seat passenger in the pick-up truck driven by Mr. Ahmadi on January 7, 2017. He was involved in MVA 4.

- [48] Mr. Salam said that he met Mr. Ziauddin in 2013 or 2014 through his wife's cousin. They socialized frequently as both lived in the same neighbourhood.
- [49] He presented as a thoughtful, credible, and reliable witness. Mr. Salam's first language was not English and, during his evidence, at times he struggled to express himself. He was clear and consistent in his recollection of what happened. When asked, he candidly said he had a beer when he was in the truck. His evidence was not shaken in cross-examination.
- [50] Mr. Salam testified that on January 7, 2017, Mr. Ziauddin called him at about 2:30 or 3:00 a.m. and asked him to hang out for a while. Mr. Salam and a co-worker, Samir, worked for a driving service that ensured that holiday partiers got home safely.
- [51] Mr. Salam invited Samir to join him, and they were picked up, near to Coquitlam Station, by Mr. Ahmadi and Mr. Ziauddin. Mr. Ahmadi was driving a silver Dodge Ram pick-up truck as shown in the photographs at Exhibits 6 and 10.
- [52] Mr. Salam sat in the rear passenger seat, behind Mr. Ziauddin, and Samir sat behind Mr. Ahmadi, the driver. They drove to a gas station to buy cigarettes and then to the top of Burnaby Mountain.
- [53] Mr. Salam testified that Mr. Ahmadi's driving was "totally normal. Like a normal driver would be driving" and "[s]o I would not see any dangerous thing that he would do when he was driving". There was no sign that Mr. Ahmadi was impaired when he picked them up. He did not see Mr. Ahmadi drink alcohol or use recreational drugs.
- [54] Mr. Salam said that the parking lot at the top of Burnaby Mountain was full of snow and it was very cold, below freezing. He testified that he believed that there was black ice and plenty of snow on the ground.
- [55] He was cross-examined on this point because photographs of the parking lot did not show snow on the ground. He explained that he was referring to the piles of snow that appeared in the photographs to have been plowed to the sides of the lot.
- [56] Mr. Salam described that there was one entrance to the parking lot and another way out. On the way into the parking lot, Mr. Salam said it was "a little bit uphill" and Mr. Ahmadi's truck tires slipped a bit. In cross-examination, Mr. Salam said he could hear the tires slip from where he was sitting in the back seat.
- [57] Mr. Ahmadi then sped up a bit and, when they got into the parking lot, Mr. Ahmadi started doing "a couple donuts, not too many". Mr. Salam said he was very scared and told Mr. Ahmadi to stop because what he was doing was unsafe. Mr. Ahmadi stopped when he was asked, and they all sat and enjoyed the view for about 15 to 20 minutes.
- [58] Mr. Salam said he felt calm after sitting there. Then, his wife called and asked him to come home. Mr. Salam asked Mr. Ahmadi to take him home. Mr. Salam testified that Mr. Ahmadi backed up normally, but he needed to go around to exit. He said that Mr. Ahmadi turned "very hard". There were curbs around the base of the lights in the parking lot, which were

covered in snow, and Mr. Ahmadi kind of "rushed it to turn around to do a last donut or I don't know what he was thinking, and I believe the front tire went on to that curb and the car started rolling from there". Mr. Salam said that he heard a loud sound from the truck's engine, which indicated speed. I understood him to mean that he heard the engine revving.

- [59] Mr. Salam did not know how many times the truck rolled. It came to rest on the driver's side. From the photographs, and from the damage to the roof of the car, it is evident that the truck rolled over, longitudinally, at least once. The observable damage would not have occurred if the truck had just flipped onto its side.
- [60] After the truck stopped rolling, Mr. Salam's first recollection was waking up, hanging by his seatbelt. He looked down and saw that Samir was bleeding and not moving. He thought Samir was dead. He got hold of the handle and managed to unbuckle his seatbelt to check on Samir, who was fine. He then turned to Mr. Ziauddin who was "not responding", he was just quiet and "was out, actually".
- [61] Mr. Salam saw Mr. Ahmadi leave the truck, climbing out through Mr. Ziauddin's window.
- [62] Mr. Salam tried to shake Mr. Ziauddin to rouse him but had to slap him to do so. Mr. Salam believed that one or two minutes passed from when he found himself hanging from his seatbelt, to when he roused Mr. Ziauddin. Mr. Salam and Samir then helped Mr. Ziauddin out of his seatbelt, and Mr. Ziauddin fell down into the driver's side of the truck.
- [63] As they were unable to open the doors, Mr. Salam used an axle that he found in Mr. Ahmadi's truck, to break the back window. He and Samir helped Mr. Ziauddin out of the truck. Mr. Salam said he was afraid that the truck would blow up and could not recall exactly how they all got out.
- [64] After they got out of the truck, they moved to a nearby bench. Mr. Salam said that, walking to the bench, the surface of the parking lot was slippery. Mr. Ziauddin was limping and had an injury below one of his knees that he showed to Mr. Salam. Mr. Salam said "we were not talking to each other. Honestly, we were - like, I said, we were under shock, we didn't know what to say".
- [65] A park patrol vehicle was the first to arrive followed by fire, ambulance, and police vehicles. Mr. Salam was taken to the hospital in an ambulance with Mr. Ziauddin. He described Mr. Ziauddin as not acting like the man he had known for years. He was very quiet, and when Mr. Salam asked him questions, Mr. Ziauddin did not respond.
- [66] Mr. Salam and Mr. Ziauddin were assessed at Royal Columbian Hospital, and both were discharged after three or four hours.

Constable Bernard's Evidence

- [67] Constable Bernard attended the accident and took pictures, marked as Exhibit 16. She confirmed that the pictures accurately showed the scene when she arrived. She acknowledged that she had no independent recollection of speaking to the passengers in the truck, other than as refreshed by her notes.
- [68] Constable Bernard was close to the end of her shift. At the start of it, she noted the weather was crisp and clear. She did not make any further note about the weather as the night went on. She confirmed that the truck was registered to Mr. Ahmadi Sr. and that he shared the same address as Mr. Ahmadi, the driver.
- [69] Constable Bernard testified that another officer went to the Ahmadi residence. The officer noted that Mr. Ahmadi Jr.'s shoes were wet and that Mr. Ahmadi's key ring did not have a key to the truck.

Andre Beaubien's Evidence

- [70] Mr. Beaubien was the paramedic who attended at MVA 4. He said that the photograph marked Exhibit 10 represented the truck as it was when he arrived. He frankly acknowledged that he did not recall the accident.
- [71] In the patient care report he completed with respect to MVA 4, Mr. Beaubien recorded that Mr. Ziauddin was a restrained front passenger and that they
- were doing donuts in empty parking lot hit concrete block causing pickup to roll possibly 2 times, [patient] was hanging upside down [with] seatbelt chocking him [and] he then blacked out until friend got seatbelt off. [Patient] self extricated.
- [72] Mr. Beaubien said that from the way he had recorded it, he believed the information came from someone who had been in the truck, not the police, but he could not recall if it was Mr. Ziauddin, or one of the other occupants, who told him this information.
- [73] Mr. Beaubien testified that he coded the event "1718" which is "multi trauma" indicating to receiving medical personnel that there was a possibility of further serious injuries. Doing so alerted the hospital and doctors about what happened and to consider whether Mr. Ziauddin suffered a brain injury. He testified that things could change really quickly despite Mr. Ziauddin scoring 15 on the Glasgow Coma Scale on initial assessment.
- [74] Mr. Beaubien took Mr. Ziauddin to Royal Columbian Hospital, instead of Eagle Ridge, as it is a trauma receiving hospital. Although he did not recall doing so, because of the coding, he said he would have strapped Mr. Ziauddin to a stretcher, put a collar on his neck, and started an intravenous line.
- [75] Mr. Beaubien did not recall taking Mr. Salam in the same ambulance although, based on Mr. Salam's evidence, it was clear that he did so.

Liability for MVA 4

- [76] Mr. Ziauddin bears the burden of proving, on a balance of probabilities, that Mr. Ahmadi breached the standard of care of a prudent driver and that Mr. Ahmadi's breach caused Mr. Ziauddin's injuries. The fact that an accident happened is not sufficient to infer negligence without a plaintiff proving facts from which an inference of negligence could be made: *Salo v. Insurance Corporation of British Columbia*, 2017 BCSC 1418 at para. 37.
- [77] ICBC does not dispute that Mr. Ziauddin has proven that the truck involved in MVA 4 was owned by the defendant Mr. Ahmadi Sr. and was operated by his son, Mr. Ahmadi, who was living with his father at the time.
- [78] ICBC also does not dispute that an accident took place and that the truck rolled at least 270 degrees on its longitudinal axis before coming to rest on the driver's side. ICBC disputes that Mr. Ziauddin has established that Mr. Ahmadi was negligent.
- [79] In his notice of civil claim, Mr. Ziauddin makes a number of allegations of negligence against Mr. Ahmadi. In summary, he alleges that Mr. Ahmadi was:
- (a) driving without due care and attention and without reasonable consideration for other persons using the highway;
 - (b) driving at a rate of speed which was excessive in the circumstances;
 - (c) driving while impaired;
 - (d) driving while using an electronic device;
 - (e) failing to drive in a careful and prudent manner having regard to all the circumstances;
 - (f) failing to keep a proper lookout;
 - (g) failing to take reasonable and proper steps to avoid the accident;
 - (h) failing to see the plaintiff's vehicle at a reasonable time, or at all;
 - (i) failing to reduce the speed of or stop the vehicle reasonably or in time to avoid the accident;
 - (j) operating a vehicle which he knew or ought to have known was in an unsafe mechanical condition;
 - (k) attempting an improper and unsafe manoeuvre; and
 - (l) failure to remain at the scene of an accident.
- [80] On the facts of this case, the only possibly applicable allegations of negligence are that Mr. Ahmadi drove the truck at a speed that was excessive in the circumstances, failed to drive in a careful and prudent manner having regard to all the circumstances, attempted an improper and unsafe manoeuvre, and failed to remain at the scene of an accident.

- [81] ICBC submits that Mr. Ziauddin was not an accurate or reliable historian because he contradicted himself in statements to various people at different times, made statements that were unlikely to be true, and repeatedly failed to recall relevant information. It submits that I ought to be extremely cautious about accepting Mr. Ziauddin's uncorroborated evidence.
- [82] In particular, ICBC relies on what it says was a change in Mr. Ziauddin's description of how MVA 4 occurred.
- [83] Based on Mr. Ziauddin's direct evidence and his answers during cross-examination, Mr. Ziauddin was unable to recall what happened in the ten to 15 minutes before MVA 4 and did not testify about any actions of Mr. Ahmadi. In particular, when asked about how the accident happened, Mr. Ziauddin said:

A We were parked at the Burnaby Mountain and just -- this is -- that much I remember. I don't remember much of that night. So we're just parked right in front of view, so, like, I was having a smoke, and my arm was out of the car. And then the next thing I see, I looked this way and I, just, like, kind of felt, like, the car is going to just land on my arm, and so I pull my hand back in. And then that's it. And then, like, I woke up, they were telling me, like, how I, like, passed out a few times. And I got up again and then I just, like, passed out again. And then the next thing I remember I was by the ambulance and there were, like, they've been taking us to the hospital.

Q So do you have any memory at all of how this accident occurred?

A No. I -- all I remember is just, like, we were parked. And then at one point he was backing up. And then I was just, like -- I just saw that the car was kind of landing on my arm, so all I remember is just pulling my arm back inside and that's how about it. I don't want to open my eyes. Everybody was there except him. Yeah.

[Transcript September 27, 2021, pg. 30, lines 10-35]

- [84] In cross-examination, Mr. Ziauddin testified that he did not recall anything about what happened in the ten to 15 minutes before MVA 4, but he said the truck was parked and Mr. Ahmadi backed out.
- [85] Mr. Ziauddin was cross-examined about Dr. Wong's note made on January 12, 2017, less than a week after MVA 4. Dr. Wong recorded that Mr. Ziauddin was a passenger in a Dodge truck, driven by a friend, and the friend was "drifting" in a parking lot and Mr. Ziauddin told him to stop but he did not and the truck flipped a couple of times. Mr. Ziauddin did not recall telling Dr. Wong that but agreed that if that was what Dr. Wong recorded, he probably said it.
- [86] Mr. Ziauddin was also cross-examined about a note Dr. Hirsch made on September 1, 2017. He recorded that Mr. Ziauddin said that his friend was doing donuts in a parking lot and the truck flipped and ended up on its roof. Mr. Ziauddin did not recall telling Dr. Hirsch that.

- [87] ICBC suggests that Mr. Ziauddin's story had changed because he was concerned that acknowledging that MVA 4 was caused by Mr. Ahmadi "drifting" or "doing donuts" might affect the outcome of his claim.
- [88] In my view, there is no direct inconsistency in Mr. Ziauddin's evidence, particularly when he was quite clear in his evidence that he did not recall how the accident had happened and said that he only knew about what happened to him from hearing from Mr. Salam. I observed Mr. Ziauddin trying to honestly and sincerely answer the questions he was asked. He acknowledged what Drs. Wong and Hirsch recorded in their notes but did not recall telling them what they had written down.
- [89] Of course, both doctors were summarizing what they heard. The medical records do not purport to be a transcript of what was said. The doctors' focus was on the mechanics of the injury as opposed to the cause of MVA 4. There is no evidence about what the doctors asked Mr. Ziauddin. For example, they may have asked him what he was doing on Burnaby Mountain before the accident. Mr. Ziauddin may have told them what he heard from Mr. Salam. Mr. Ziauddin was adamant that he had no independent recollection of what occurred.
- [90] If Mr. Ziauddin wanted to mislead the court, and if he and Mr. Salam concocted an explanation of what happened, Mr. Ziauddin could simply have mirrored Mr. Salam's evidence. He did not. Instead, he said he did not recall what happened except for Mr. Ahmadi backing up and becoming aware that the vehicle was rolling over and he pulled his arm in.
- [91] Of course, the one witness who could have shed light on what happened was Mr. Ahmadi, and he chose not to appear in the action or to attend at trial to give his evidence, despite being served with a subpoena.
- [92] Having considered all of the evidence, including the evidence of Mr. Salam, which I accept, I conclude on a balance of probabilities that, earlier in the evening, Mr. Ahmadi was drifting and doing donuts in the parking lot but, when Mr. Salam asked him to stop, he did. Mr. Ahmadi stopped the truck so that the parties could look out at the view. There was a 15-20-minute period during which all of the occupants of the truck sat and enjoyed the view. MVA 4 happened as they were leaving the parking lot.
- [93] I also conclude that Mr. Ahmadi backed up from the spot where he had parked, overlooking the view, and then made a hard turn too quickly for the slippery conditions that he knew existed in the parking lot. Mr. Salam heard the noise of the engine and was aware of the hard turn. Mr. Ahmadi travelled at an excessive speed in the circumstances. I also conclude that Mr. Ahmadi failed to drive in a careful and prudent manner having regard to the conditions. He attempted to leave the parking lot quickly, in an improper and unsafe manoeuvre. I cannot conclude that Mr. Ahmadi was doing donuts as he was leaving the parking lot.

- [94] In light of Mr. Salam's evidence, and on a balance of probabilities, I also draw an inference that Mr. Ahmadi left the scene, failed to appear in the action although served with the claim, and did not respond to the summons although served with it, because he was at fault for MVA 4. Mr. Ahmadi did not appear to refute that inference or to suggest that there was another reason for him leaving the scene. This case is distinguishable from *Finlayson v. Insurance Corporation of British Columbia*, [1994] B.C.J. No. 2884 (S.C.) and from *Saló*. Here, there is direct evidence about the movements of Mr. Ahmadi's truck before MVA 4 and evidence of what caused Mr. Ziauddin's injuries.
- [95] ICBC also submits that Mr. Ziauddin should not be considered reliable because he tried to hide the fact that he was in an accident from his mother. It submits that I should conclude that his behaviour was "consistent with an acknowledgement of guilt" in relation to MVA 4. It points to the fact that Mr. Ziauddin had his phone and could have called his mother to reassure her that he was fine before arriving home.
- [96] It also points to what it says is Mr. Ziauddin's unbelievable explanation for why, after he was released from the hospital, and before going home, he bought new clothes. ICBC suggests that he did so to hide the fact that he had been in an accident from his mother and because he engaged in risky behaviour.
- [97] Mr. Ziauddin testified that his clothes were bloody and he did not want his mother to see him like that.
- [98] Mr. Ziauddin was unshaken in his explanation during cross-examination, and I conclude that it was probable in all the circumstances. Those circumstances include the relatively recent death of his father and Mr. Ziauddin's assumption of responsibility for his family. Rashid described Mr. Ziauddin as a "role model" to him and his brothers. It is probable that he did not want to upset his mother and family who were dependent on him and looked to him as a role model. This was also Mr. Ziauddin's fourth accident in a relatively short time.

The Negligence of Sayed Ahmad Ahmadi

- [99] Having found that Mr. Ahmadi was negligent, pursuant to s. 86 of the Motor Vehicle Act, R.S.B.C. 2986, c. 318, Mr. Ahmadi Sr. is vicariously liable for Mr. Ahmadi's negligent actions, as the evidence is that Mr. Ahmadi lived with him, was a member of the owner's family, and drove the truck with his consent. Mr. Ahmadi Sr. did not appear in the action to argue that Mr. Ahmadi was not a member of his family or that he did not live with him.

Was Mr. Ziauddin Contributorily Negligent in MVA 4?

- [100] ICBC alternatively submits that Mr. Ziauddin was contributorily negligent. It pleaded that he was knowingly riding with an unqualified driver and failed to take steps to exit the vehicle, or to ask Mr. Ahmadi to stop, when he knew Mr. Ahmadi was, or was likely to commence, engaging in dangerous and/or negligent driving.

[101] The law with respect to contributory negligence was discussed by the Court of Appeal in *Wormald v. Chiarot*, 2016 BCCA 415. At para. 13, the Court cited *Bradley v. Bath*, 2010 BCCA 10 at para. 25 where Justice Tysoe described contributory negligence:

[25] The concept of contributory negligence was described in John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 302, as follows:

Contributory negligence is a plaintiff's failure to meet the standard of care to which he is required to conform for his own protection and which is a legally contributing cause, together with the defendant's default, in bringing about his injury...

[Emphasis added by Tysoe J.A.]

[102] In *Wormald*, the Court said that the analysis for contributory negligence involves two considerations. First, whether a plaintiff failed to take reasonable care in their own interests; and if so, second, whether that failure was causally connected to their losses. The Court went on to state:

[15] To satisfy the requirement of a causal connection between the plaintiff's breach of the standard of care and the loss sustained, the defendant must establish more than that but for her negligence, the damage would have been avoided. The plaintiff's conduct must be a "proximate cause" of the loss in that the loss results from the type of risk to which the appellant exposed herself: *Bevilacqua v. Altenkirk*, 2004 BCSC 945 at paras. 39-43 (per Groberman J., as he then was). In other words, the plaintiff's carelessness must relate to the risk that made the actual harm which occurred foreseeable: *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219, [1998] 6 W.W.R. 233 (C.A.) at para. 13.

[103] In the circumstances of this case, if I accept that Mr. Ziauddin failed to take reasonable care in his own interests, that failure would be causally connected to his losses.

[104] However, I conclude that there was nothing inherently risky in Mr. Ziauddin accepting a ride from Mr. Ahmadi as he had done on at least one prior occasion. He had seen Mr. Ahmadi drive the truck previously without incident. Mr. Salam, who was employed to drive people home when they had too much to drink, testified that when he was picked up by Mr. Ziauddin and Mr. Ahmadi, there was no indication that Mr. Ahmadi was impaired by drugs or alcohol, and that he did not see Mr. Ahmadi consume drugs or alcohol when they were on Burnaby Mountain.

[105] Mr. Ziauddin and Mr. Salam did not know that Mr. Ahmadi would do donuts or drift in the parking lot. Further, Mr. Salam testified that, when he asked Mr. Ahmadi to stop, Mr. Ahmadi did so. They then sat, admiring the view for 15-20 minutes, and Mr. Salam felt calm. Neither Mr. Ziauddin nor Mr. Salam had reason to believe that Mr. Ahmadi would engage in risky behaviour when they left to go home.

[106] Although I accept that Mr. Ahmadi engaged in risky behaviour when they arrived at Burnaby Mountain, he stopped that behaviour for 15 or 20 minutes before MVA 4, and Mr. Salam said that he felt calm after Mr. Ahmadi stopped. There was nothing inherently or unacceptably dangerous in Mr. Ziauddin remaining in Mr. Ahmadi's vehicle in the circumstances. Mr. Salam and his friend also remained. Mr. Ziauddin was not required to take any further steps for his own protection.

[107] I conclude that Mr. Ziauddin was not contributorily negligent.

Mr. Ziauddin's injuries

[108] In their closing submissions, the defendants in the actions regarding MVAs 1-3 concede that Mr. Ziauddin suffered soft tissue injuries to his left knee and lower back in all three accidents. The defendants also concede that Mr. Ziauddin suffered soft tissue injuries to his neck as a result of MVA 2. Finally, the defendants concede that MVAs 1-3 have played a part in bringing on Mr. Ziauddin's somatic symptom disorder, and that he suffered anxiety and depression following MVA 3.

[109] I accept that Mr. Ziauddin suffered knee, back, and neck injuries in MVA 4, all of which exacerbated his earlier injuries.

[110] The defendants and ICBC do not argue that Mr. Ziauddin's injuries are divisible. It is possible that Mr. Ziauddin suffered a mild traumatic brain injury in MVA 4 but, as set out below, Dr. Wong and Dr. Hirsch were not certain. Dr. Wong opined that Mr. Ziauddin's headaches might be causally connected to his neck injury, and Dr. Hirsch said that Mr. Ziauddin's cognitive difficulties might be causally connected to chronic pain or sleep deprivation. In any event, Dr. Hirsch opined that, if Mr. Ziauddin suffered a mild traumatic brain injury in MVA 4, he had made a full recovery.

[111] As a result, the defendants and ICBC do not suggest that there is a divisibility issue in this case.

[112] My overall impression of Mr. Ziauddin's evidence about his injuries was that he tended to downplay them. He did not exaggerate the level of his pain or its impact on his life. He presented as a stoic individual.

Mr. Ziauddin's Injuries in MVA 1

[113] Mr. Ziauddin described an injury to his left knee with some soreness and tightness a week after the accident. He could feel soreness in his knee when he moved quickly. He testified that he did not take the injury to his knee seriously at the time. I did not find this surprising as he was a fit and athletic young man, and he expected that he would recover from MVA 1 quickly and fully.

- [114] Mr. Ziauddin testified that he took some time off of work after MVA 1, he believed about a month, but was unsure. He did not recall any specific treatments. He testified that he had returned to full-time work before MVA 2.

Mr. Ziauddin's Injuries in MVA 2

- [115] Mr. Ziauddin described the accident as not too severe. He did not expect the collision and was confused by how it happened. He noticed a whistling in his ears afterwards. He sat in the car for five or ten minutes before he got out. He felt pain in his lower back going up to his mid back, between his shoulders.
- [116] Mr. Ziauddin testified that his knee had recovered a little before MVA 2, but he re-injured it.
- [117] Mr. Ziauddin testified that before MVA 2, "if [he] wanted to do something, [he] wouldn't think, [he would] just do it". After MVA 2, it was "always in [his] head, like, am I going to be able to do it, am I going to hurt myself?" I conclude that he was more cautious after MVA 2 and not able to do things that he previously took for granted.
- [118] Mr. Ziauddin was not certain whether he took time off after MVA 2, but he believed he did so. He said his time off of work was, in part, because he did not have access to a vehicle and, in part, because he felt knee pain. He testified that he believed he then worked part time, possibly two to three or four hours a day.
- [119] Mr. Ziauddin believed that he had returned to work prior to MVA 3, but he could not recall whether he did so on a full- or part-time basis. He also believed that he was still doing siding work but could not recall whether it was with L2 Exteriors.

Mr. Ziauddin's Injuries in MVA 3

- [120] Mr. Ziauddin testified that his injuries in MVA 3 were a lot worse than those in MVAs 1 and 2 and, as a result, he started to take his injuries very seriously. His back hurt. He did not want to sit due to pain, and he was more comfortable lying down. He could not recall whether he hit his head in MVA 3.
- [121] Mr. Ziauddin testified that, after MVA 3, he tried to leave construction work because he could not do it full time. He was unable to lift things as he had before. His lower back was sore when he bent to lift materials. He had difficulty cutting and carrying siding. He also had difficulty looking up. He was looking for easier jobs.
- [122] After MVA 3, at the end of a work day, Mr. Ziauddin went home to lie down. His relationships with his friends changed as he was no longer involved in his previous activities.

- [123] Mr. Ziauddin said before MVA 3, he tried to return to sports. After MVA 3, when he was sitting, running or walking, he felt really bad back pain and he could not play sports. He testified that before MVA 3 his sleep was "not bad", and he did not recall having headaches, but his injuries continued to interfere with his work. He described how he had been "really, really fit" but he slowly gained weight, approximately 60 lbs, so it was hard for him to run. Following MVA 3, he was no longer involved in soccer.
- [124] Mr. Ziauddin said he required help from his family with household chores. One of his brothers did his laundry for him, as the laundry facilities were in another apartment building in the complex where they lived.

Mr. Ziauddin's Injuries in MVA 4

- [125] Mr. Ziauddin testified that he had not recovered from his injuries in MVAs 1-3, when he was in MVA 4. He was still suffering from back, neck, and knee pain, although his knee pain was intermittent.
- [126] Just before MVA 4, Mr. Ziauddin started talking to friends about doing work outside the construction industry. He sent out résumés looking for work installing fibre optic cables. He believed that he had just started work in that field when he was in MVA 4.
- [127] Mr. Ziauddin said that after MVA 4 his back and neck pain were worse, he suffered headaches, and woke up often during the night. He said he has not seen much improvement in his condition since MVA 4. He described problems with his memory and said that was his worst symptom.
- [128] Mr. Ahmadyar, Mr. Ziauddin's former soccer coach, described the change he observed in Mr. Ziauddin after the MVAs. He said he was a different person, who was not as aggressive or passionate, and way less sociable.
- [129] Mr. Kazemi, Mr. Ziauddin's former teammate, described Mr. Ziauddin after the accidents as not being as "outgoing or happy or bubbly" as he once was. He said he was a bit more deflated and kept "a little bit more to himself". He said that Mr. Ziauddin had gained about 30-35 lbs.
- [130] Mr. Ziauddin's brother Rashid shares a bedroom with him at the family home. He described that when Mr. Ziauddin is at home, he is in bed. He testified that during the night, every ten or 15 minutes, Mr. Ziauddin is tossing around in bed. Mr. Ziauddin is up and down in the night. He complains about being uncomfortable and sometimes groans in pain. Rashid said that Mr. Ziauddin keeps to himself, and he is on edge and cannot do half the things he used to be able to do. He described Mr. Ziauddin as "not the same person", grumpy, and not as sociable.

- [131] Rashid also testified about how he helped Mr. Ziauddin at work, assisting him with heavy lifting and other tasks. Rashid testified that he had been helping Mr. Ziauddin three to four days a week, for five or six hours a day, for the past year and a half.

Mr. Ziauddin's Work History

L2 Exteriors

- [132] Mr. Ziauddin testified that after leaving high school and working in a pizza store, he started working in construction for L2 Exteriors. Friends told him that it was a good job to get into. He thought he found the job through Craigslist. He could not recall how long he had done that job but said that he had no difficulties doing it and he had a good relationship with his employer, who never told him he had issues with his work.
- [133] Prior to MVA 1, and for 16 weeks, Mr. Ziauddin worked full time with L2 Exteriors earning \$17 an hour, working 40 hours a week. He installed siding on buildings, including installing siding trims, fascias, rain screening, and building wraps. The work required Mr. Ziauddin to hold weights and product up high.
- [134] Arvis Kemp, the owner of L2 Exteriors, testified that the work required twisting, bending, climbing, and being in awkward positions. He observed Mr. Ziauddin perform the work and said he was physically capable of doing it. Mr. Ziauddin was able to keep up with the other employees/contractors. He did not recall Mr. Ziauddin calling in sick or missing days, and he did not ask for help in performing the job. He would not describe Mr. Ziauddin as lazy or unmotivated. He was satisfied with Mr. Ziauddin's work.
- [135] Mr. Kemp testified that Mr. Ziauddin missed 20 days of work from November 13, the day after MVA 1 to December 14, 2015, losing gross pay of \$2,720. He could not recall whether Mr. Ziauddin returned to work for him thereafter.
- [136] Mr. Ziauddin was unable to recall how long he took off from work after MVA 1. He testified that it might have been a month or less.
- [137] On the best available evidence, I find that Mr. Ziauddin lost 20 days of work following MVA 1.

Quality Installation

- [138] Ghulam Shah testified that he and Mr. Ziauddin were neighbours. They started to work together in February 2016, after MVA 2, in a company Mr. Shah started, called Quality Installation. At that time, Mr. Ziauddin obtained a contract for them to install siding on approximately ten townhouses. They planned to complete the work themselves and agreed to share the profit equally. Mr. Shah confirmed that Mr. Ziauddin told him about the injuries he had suffered but said he had a family to feed because of the death of his father. Mr. Shah figured the arrangement would work, and he knew Mr. Ziauddin to be fit, as he had seen him playing soccer and basketball.

- [139] Mr. Shah noticed that Mr. Ziauddin had difficulties as soon as they started the project. Mr. Ziauddin would take breaks or lay back in his car. Mr. Shah realized the extent of Mr. Ziauddin's injuries and that he could not work a full eight hours. Mr. Ziauddin would show up late and leave early.
- [140] Mr. Shah testified that he and Mr. Ziauddin had agreed to work between nine and 15 hours a day, six days a week, taking Sundays off, to finish the job. As Mr. Ziauddin could not keep up with that pace, they agreed to take Saturdays off as well and work eight to nine, possibly ten, hours a day. Mr. Shah said that "even that it was hard for him to - do it". He estimated that some days, Mr. Ziauddin worked four to six hours but said he never worked an eight hour or an 11-hour shift.
- [141] Mr. Shah testified that the heaviest part of their work was installing "James Hardie" siding made of fibre cement (often referred to as Hardie Plank siding), installing 2x12 and 2x10 fascias, putting up scaffolding, and using ladders and 300 lb. pump jacks. To do the work, he and Mr. Ziauddin wore a tool belt and used nail guns. Installation of siding requires crouching under decks, working in awkward positions, bending, and working overhead.
- [142] Mr. Shah testified that he gave Mr. Ziauddin a chance but they were not getting the work done as Mr. Shah was doing 80 percent of the work and Mr. Ziauddin was not performing well. Mr. Shah testified that he "sat down with him, I said, you know what, Farid, like, I was making more money before, like, opening my new company, because right now, whatever I'm making, I'm splitting with you, so this is not how it's going to work. Like, either, I'm going to step out or go back where I was or, like, it's not going to work with you". Mr. Shah offered Mr. Ziauddin \$30 per hour, but Mr. Ziauddin did not agree to that proposal and, after a month of working together, they went their separate ways. Mr. Shah testified that Mr. Ziauddin was paid \$4,000 for the month of work.
- [143] Mr. Shah prepared the CL 15 form marked as Exhibit 19 in which he recorded that Mr. Ziauddin was a part-time employee earning \$30 an hour for a total of \$4,000 from February 11 to March 25, 2016. Mr. Shah testified that he came to this figure, instead of a 50/50 profit split, because Mr. Ziauddin could not perform. He calculated the hours that Mr. Ziauddin worked in the 38-day period at 133.6 and paid him \$30 an hour. He confirmed that he estimated that Mr. Ziauddin lost \$5,120 during that period and that, but for his injuries, he could have expected to earn \$9,120.
- [144] Mr. Shah said that his total profit for the townhouse project was \$126,000 over five or six months, and Mr. Ziauddin would have earned \$63,000 as his share of that, had he been able to complete the work. He also testified that their bid for the project was low in order to get the work and that, since then, he has increased his bids. On a recent bid for a job of about the same size, he expected to make a profit of \$900,000 to \$1,000,000 for about a year's work.
- [145] Mr. Shah said that he had recently hired Mr. Ziauddin to work with him and paid him \$1,500 for two weeks doing piecework under a sub-contract. With respect to Mr. Ziauddin's physical ability during this period, Mr. Shah described it as being about the same as when

they initially worked together. He said, "[h]e would have a pain and he would sit down - and go sit - lay down in the car a little bit he was doing the same, like, not putting that much hours". He testified that he could have done the work that Mr. Ziauddin did in two weeks, in three days.

- [146] Mr. Shah testified that he does not usually have piecework projects. He said it would be unfair to other sub-contractors to give them the hard work and Mr. Ziauddin the easy work. He confirmed that his other sub-contractors are paid between \$6,000 and \$10,000 a month but he had paid one sub-contractor \$17,000-\$18,000 a month.

Progressive Telecom

- [147] Mr. Ziauddin began working with Progressive Telecom ("Progressive") in 2017, after MVA 4, installing fibre optic cable. He did not work for the first month after MVA 4. He then moved to Edmonton where he worked for two or three days a week, although he recalled that, on occasion, he was unable to work for a week. He described his work as flexible and he would just test a day ahead and advise that he would not be working the following day.
- [148] Mr. Ziauddin testified that there was work available seven days a week but he was not paid when he did not work. He believed that he could have earned at least 30 percent more by working a five-day week and even more working seven. He was paid \$300 a day for eight hours of work. If he worked less hours, because he was not feeling "good", he would get less; sometimes \$150 or \$250. He testified that although he did not keep track, there were a lot of days on which he did not work eight hours.
- [149] Mr. Ziauddin testified that his gross income was almost \$52,000 in 2017 but he incurred expenses, including living costs (rent and food) and travel back and forth between Edmonton and Vancouver, where he continued to help his family financially. Mr. Ziauddin said that he did not return home for about six months. There was no evidence about the specific deductions that reduced his gross income to a net income of \$22,609.
- [150] Mr. Ziauddin described the difference between indoor and outdoor fibre optic work. The lighter work was inside but the more important work was outside. He testified that he lost wages by restricting his work to inside jobs. He did not get a raise because he was not committed to the job to the same extent as the other employees.
- [151] Mr. Ziauddin also worked for Progressive in 2018, earning gross business income of over \$47,000 and net income of almost \$20,000. A T4A slip from Progressive was in evidence showing the amount of \$17,871.
- [152] Mr. Ziauddin testified that in 2018 Progressive assigned him to outside work, which he testified was harder. He said he had his brother with him to help him pull cable. He covered all of his brother's expenses. Mr. Ziauddin said he was making \$300 a day and he lost pay but could not quantify how much.

- [153] Abdul Khalid is the owner of Progressive. He testified that Mr. Ziauddin was an employee of Progressive as of January 2017 until May 6, 2018, when Mr. Ziauddin advised him that he "needed to go to rehab"; and, again, from October 5, 2019, when Mr. Ziauddin returned with a helper to assist him, until January 10, 2020, when work slowed down due to COVID-19, and Mr. Ziauddin was not earning enough to cover his bills.
- [154] Mr. Khalid prepared letters regarding Mr. Ziauddin's employment, dated March 10, 2018, and August 18, 2021. Together, they were marked as Exhibit 7.
- [155] Mr. Khalid testified that Mr. Ziauddin's job duties with respect to inside wiring included running fibre optic cable from a main electrical room to each individual unit in a building. The work involved the use of a ladder to get above 8 or 9 ft. ceilings, fishing wire through wire moulds, or inside conduits, which can either be at ground level, at waist or at ceiling height. He estimated that 80 percent of the work was overhead and the other 20 percent was inside the main electrical room, performing intricate work dressing the cable.
- [156] Mr. Khalid described the outside work as either underground in a manhole, or aerial, using a bucket truck, to bring the wire from a pole to the main electrical room in a building. He confirmed Mr. Ziauddin's evidence that the outside work was more challenging.
- [157] Mr. Khalid testified that Mr. Ziauddin was paid a living allowance on some jobs of \$180 a day. He said that Mr. Ziauddin worked less than the 12-15 days a month that he had agreed to. Mr. Khalid had work six days a week for eight hours a day, but Mr. Ziauddin called in sick or rejected more work due to pain.
- [158] Mr. Ziauddin earned \$51,095 gross with Progressive in 2017, and he confirmed the accuracy of Progressive's T4A statements.
- [159] Mr. Ziauddin testified that Progressive had experienced a drastic reduction in work due to COVID-19 since occupants of building suites did not want technicians in their suites. Available work has increased but not to the same level as before COVID-19. The installation of fibre optic cables will, at some point, become obsolete.
- [160] Mr. Khalid testified that he would hire Mr. Ziauddin again depending on the commitment he could make to completing the work.
- [161] I also heard evidence from Mohammad Karimi who met Mr. Ziauddin through soccer in 2009 or 2010. He was a foreman employed with Progressive and first worked with Mr. Ziauddin when he trained him to install fibre optic cable in Edmonton. He said Mr. Ziauddin was a good worker but he was expected to work Monday to Saturday, however, he did not always show up for work and he would forget things. He understood that Mr. Ziauddin was experiencing back and neck pain. Mr. Karimi complained to Mr. Khalid about Mr. Ziauddin.

[162] After working with Mr. Ziauddin in Edmonton, Progressive moved him to Calgary in March 2017, to Castlegar in June 2017, and then to Revelstoke before moving him back to Vancouver. Mr. Ziauddin continued to be a good worker but missed time. Mr. Karimi estimated that Mr. Ziauddin only worked 40-50 percent of the time.

Noble Services

[163] On a date that was not clear in the evidence, but was after Mr. Ziauddin worked for Progressive, Mr. Ziauddin and two of his friends started a company called Noble Services ("Noble") to install fibre optic cable. His role was to deal with the contractors and plan the work, as his communication skills were better.

[164] Mr. Karimi worked for Noble at some point in 2018. He testified that he understood that Noble shut down because Mr. Ziauddin was not showing up.

Greystone Technical

[165] Marin Tcehpichev is the owner of Greystone Technical ("Greystone"), another fibre optic cable company. He testified that he employed Mr. Ziauddin for about four months in the summer of 2019, "pulling [fibre optic cables] into people's homes". Mr. Ziauddin was part of a crew of five or six sub-contractors, and he was sometimes assigned to supervise junior members of the crew as he was "more or less" the most senior member.

[166] The work involved at least two people, one inside the unit and the other in the electrical room. As the senior worker of the two, Mr. Ziauddin would tell the younger technician what to do and how to do it. Mr. Tcehpichev confirmed that the work inside the unit involved sending a fish tape or a fish rod into an existing conduit and sending it into the customer's unit. From the other side, the technician would tie in the cable and then pull back the fish rod with the cable into the conduit. About 95 percent of this work is performed about a foot from the ground and 5 percent looking up and using ladders. The work outside in the electrical room involves pulling the wire from ground level, through conduit, into the electrical room.

[167] Mr. Ziauddin's work with Greystone ended because there was not enough work and the company dissolved in September 2019. Mr. Tcehpichev said that Mr. Ziauddin was offered full-time work, and if he worked less than that, it was because he took the time off.

[168] Mr. Tcehpichev paid Mr. Ziauddin \$25 an hour and a "living out" allowance of \$135 for room and board. He confirmed that Mr. Ziauddin's invoices, marked Exhibit 7, were paid by Greystone for the work performed in the billing periods on the invoices.

M Tel Inc.

[169] Mr. Ziauddin testified that he did some work for a company called M Tel Telecom or M. Tel Inc. ("M Tel") in Calgary in 2020, installing fibre optic cable. A friend of his, who was used to doing outside fibre optic work, got a contract to wire the inside of a building, putting wiring

around ceilings. The friend did not have experience doing this kind of work, and he called Mr. Ziauddin to help him. Mr. Ziauddin went to Calgary, but as soon as he arrived, COVID-19 prevented them from working for a couple of months. Mr. Ziauddin recalled working for M Tel for about two months before returning to Vancouver to work in construction. He was paid \$70 a condo unit to activate the cable and do the testing. He estimated that each unit took about 20 minutes. The work eventually slowed down. His friend learned how to do it himself, and no longer needed him.

- [170] Mr. Ziauddin described that the work put pressure on his neck because he was always looking up, and activating the cable put "a lot of pressure on my head and my eye as well. There's 12 different colours in, like, a really tiny wire". He would get a headache because "I have to focus really bad because there's a colour code. If I ruin one, so then you'd have to run a new cable". Mr. Ziauddin said that he had done the work before and it would take him about five minutes to do it. Mr. Ziauddin testified that he would do that work again if he could get it, but he called a few people in September and they were out of work.
- [171] Mr. Ziauddin testified that he took breaks from his work with M Tel because of his accident-related injuries. Mr. Ziauddin returned to Vancouver and was looking for work.
- [172] There were no documents with respect to his employment with M Tel, but the income was reflected in Mr. Ziauddin's 2020 income tax return.

Eslica Construction

- [173] Habibhullah Bouri Shah met Mr. Ziauddin when they were in high school. Mr. Ziauddin began working with Mr. Bouri Shah in about October 2020 at Mr. Bouri Shah's company, Eslica Construction ("Eslica"), and they worked together until about July 2021. Eslica focussed on exterior siding work. Mr. Bouri Shah had been in construction for a long time but had never done siding work.
- [174] Mr. Ziauddin testified that he approached Mr. Bouri Shah and asked him for work. Mr. Bouri Shah told him that there was no hourly work for him. Mr. Ziauddin suggested that if Mr. Bouri Shah could get a team together, he would get siding installation work from his contacts in the business.
- [175] Mr. Bouri Shah agreed, and Mr. Ziauddin got them their first contract.
- [176] When they initially started working together, they agreed to split the profits 50/50, but, at some point, Samin Salam also started working with Eslica and, for a few months, the profits were split three ways. After Mr. Salam left, profits were again split between Mr. Ziauddin and Mr. Bouri Shah on a 50/50 basis.
- [177] Mr. Bouri Shah testified that Mr. Ziauddin did not meet his expectations as a partner. They were getting enough work, but Mr. Ziauddin was underperforming. He did not show up on time, missed days, and took longer breaks. Mr. Ziauddin was slow and needed help. As a result, Mr. Bouri Shah had to work longer hours. He testified that he was working ten to 12

hours compared to Mr. Ziauddin's six to seven hours. He said that Mr. Ziauddin was physically incapable of working longer hours and that some jobs were harder for Mr. Ziauddin because he was not as agile. Mr. Bouri Shah agreed to perform the harder tasks while Mr. Ziauddin did the lighter ones.

- [178] According to Mr. Bouri Shah, their work relationship ended when he advanced Mr. Ziauddin \$5,000 for a job that he did not perform, and Mr. Ziauddin was unable to repay. Mr. Bouri Shah testified that his business has improved since he stopped working with Mr. Ziauddin.
- [179] Mr. Bouri Shah testified that the invoices at pages 17 and 18 of Exhibit 7 represent Mr. Ziauddin's share of the profits for the periods set out in the invoice but that expenses were also included in the invoices of about \$7,000, which he said Mr. Ziauddin owed to Eslica for travel and tools. The payment of \$5,000 in July 2021 was an advance for work Mr. Ziauddin never performed.
- [180] Mr. Ziauddin testified that his last day working with Eslica was July 17. Mr. Ziauddin testified that he was not putting in as much work as Mr. Bouri Shah and Mr. Samim, so they decided to all go their own ways.
- [181] Mr. Ziauddin testified that he is now picking up work wherever he can and that he sometimes has helpers.

The Medical Evidence

- [182] The defendants and ICBC did not call any medical evidence.
- [183] On behalf of Mr. Ziauddin, I heard evidence from: Dr. Andrew Wong, his family doctor; Dr. Gabriel Hirsch, a physiatrist, who assessed Mr. Ziauddin on two occasions; and Dr. Kulwant Riar, a psychiatrist, who assessed Mr. Ziauddin.

Dr. Andrew Wong

- [184] Dr. Wong was qualified to give expert evidence in the area of family medicine.
- [185] Dr. Wong first met Mr. Ziauddin in November 2015 when he attended for an ankle injury. Dr. Wong saw Mr. Ziauddin after all four MVAs.
- [186] Dr. Wong prepared an April 27, 2017 expert report, marked as Exhibit 11, in which he outlined his observations of Mr. Ziauddin on his attendance at his office on February 17, 2017. Dr. Wong set out the history of his doctor/patient relationship with Mr. Ziauddin and the symptoms and complaints Mr. Ziauddin reported after each of the MVAs.

- [187] With respect to MVA 1, Dr. Wong first saw Mr. Ziauddin on November 16, 2015. Mr. Ziauddin complained of left knee pain and low back pain. There was genuine tenderness over the left sacroiliac joint and tenderness at the distal left quadricep near the superior edge of the patella. Dr. Wong prescribed Naproxen, Voltaren gel and referred Mr. Ziauddin to physiotherapy. A left knee x-ray at Royal Columbian was normal.
- [188] When he next saw Mr. Ziauddin on December 7, 2015, the left knee pain had resolved, but the low back pain had not.
- [189] Dr. Wong saw Mr. Ziauddin again on January 18, 2016, after MVA 2. He was having difficulty working reduced five-hour days. He described new bilateral neck stiffness, worse on the left side than on the right and worse left knee pain around the patella. Dr. Wong concluded that there was new musculotendinous neck pain, whiplash associated disorder and an aggravation of left knee patellofemoral syndrome. Dr. Wong said that the plan was for Mr. Ziauddin to continue working five- hour days, doing physiotherapy, and to return in two weeks. Mr. Ziauddin returned the following week for worsening neck pain. Mr. Ziauddin was taking Advil for pain.
- [190] Dr. Wong next saw Mr. Ziauddin on May 19, 2016, following MVA 3. Dr. Wong diagnosed a soft tissue injury to his neck, low back, and an aggravation of his previous left knee injury. Mr. Ziauddin had also developed insomnia secondary to pain. Dr. Wong recommended that Mr. Ziauddin be off of regular work duties and hours until June 10 but said he might be able to do modified duties. Mr. Ziauddin was referred to physiotherapy and given a prescription for Naproxen and Cyclobenzaprine.
- [191] On his visit on August 29, Mr. Ziauddin said his return to part-time work had not been successful and he was changing jobs. He was doing physiotherapy twice a week. His pain was improving, but he still had pain in the base of his neck and mid back on both sides but greater on the left, along with low back pain. An x-ray on November 2016 was normal.
- [192] Dr. Wong next saw Mr. Ziauddin on January 12, 2017, after MVA 4. He was experiencing pressure at the back of his head, photophobia, and had more difficulty sleeping. He had diffuse tenderness at the mid and low back levels. Dr. Wong diagnosed him with musculotendinous injury and post-concussion syndrome.
- [193] Mr. Ziauddin was next seen on January 19, 2017. While his symptoms were improving, he still had upper back, neck, and low back pain. He complained of eye pressure but the photophobia had resolved. He had ongoing stress about losing a new job and wanted to work. He was to be off work but could do on-call work so long as his concussion symptoms did not worsen. In February 2017, Mr. Ziauddin was having difficulty sleeping, he said his neck was always tired and, a couple of times a day, he experienced sharp pains of the low back if he stood too long and when he turned over in bed. He had headaches. The plan was for Mr. Ziauddin to gradually return to work.
- [194] Dr. Wong summarized his findings at page 5 of his report.

- [195] After MVA 4, Dr. Wong confirmed that Mr. Ziauddin suffered injuries to his upper, mid, and low back. With respect to the mid back, Dr. Wong suggested that it was likely to have been caused by mechanical compensation due to his knee, neck, and back pain, possibly from MVA 3.
- [196] With respect to causation, Dr. Wong opined that Mr. Ziauddin's complaints were more likely a result of MVA 1, which were then aggravated by MVA 3 and which were likely slow to heal due to MVA 4.
- [197] Dr. Wong also noted radicular symptoms he believed were due to muscular tendinitis and muscle spasms. He diagnosed left knee pain likely due to MVA 1 and aggravated by MVAs 2 and 3, resulting in Mr. Ziauddin's injuries being slow to heal due to repetitive use in everyday tasks and his efforts to return to work.
- [198] Dr. Wong also identified that Mr. Ziauddin suffered from neck pain, which was more prominent on the left, but also on the right, and opined that these complaints were likely secondary to MVA 1 and aggravated by MVA 2, daily living activities, postures, and the physical nature of Mr. Ziauddin's work.
- [199] Dr. Wong noted that Mr. Ziauddin first experienced insomnia after MVA 3 and indicated that the sleeplessness was secondary to pain. He said that with Mr. Ziauddin's time off of work increasing, and resulting financial concerns, his impression was that psychological stress was also contributing to Mr. Ziauddin's insomnia, although he had not discussed that with Mr. Ziauddin in full detail. He recommended that Mr. Ziauddin see a psychologist if he was open to doing so.
- [200] Mr. Ziauddin said that he met with a counsellor once but did not find it helpful. It was clear from his evidence that Mr. Ziauddin did not like speaking about his symptoms to a professional.
- [201] Dr. Wong noted that Mr. Ziauddin started experiencing headaches after MVA 4 and opined that his symptoms were most in keeping with post-concussion syndrome. It was also likely that the headaches were caused by Mr. Ziauddin's neck injuries. With respect to Mr. Ziauddin's headaches, Dr. Wong suggested that he comply with the concussion protocol and gradually return to work and activities.
- [202] With respect to vocational disability, Dr. Wong recommended that Mr. Ziauddin remain off of work to a certain degree with respect to duties and hours of work for specified times as outlined in his report. Dr. Wong noted that Mr. Ziauddin would benefit from a gradual return to work with the guidance of an occupational therapist and it would be reasonable for Mr. Ziauddin to perform modified duties with close monitoring for worsening symptoms. Dr. Wong noted that, as of the date of his report, Mr. Ziauddin would not be able to carry out the full duties and hours required in his construction job.

- [203] Dr. Wong expected that with therapy, Mr. Ziauddin would make a full recovery from his low and mid back pain, neck pain, and insomnia in six to 12 months. He also expected that with therapy, and a stabilizing brace, his left knee pain would resolve in three months. If the knee pain did not resolve, he would consider referring Mr. Ziauddin to a physiatrist. He did not provide a timeline for recovery from insomnia.
- [204] Dr. Wong most recently assessed Mr. Ziauddin on June 11, 2021. He did not provide an updated report but observed him to still have tightness of the muscles around the spine, upper back, and low back. His knee symptoms were also fairly similar. Dr. Wong confirmed that Mr. Ziauddin's symptoms on examination had been pretty similar for some time. His suggested dates for recovery have passed.

Dr. Gabriel Hirsch

- [205] Dr. Hirsch was qualified to give opinion evidence as a physiatrist, an expert in physical medicine and rehabilitation.
- [206] Mr. Ziauddin was assessed by Dr. Hirsch twice, in August 2017 and in January 2021.
- [207] In his first report, dated September 1, 2017, Dr. Hirsch diagnosed that Mr. Ziauddin had suffered left knee injuries in MVAs 1-3, which had mostly resolved. In cross-examination, Dr. Hirsch agreed that Mr. Ziauddin had made an excellent recovery with respect to his knee injury and that it was his opinion that there were no long-term adverse consequences to Mr. Ziauddin's left knee.
- [208] Dr. Hirsch diagnosed neck injuries in MVAs 2-4 and a low back injury in all four accidents, which were still symptomatic. He reported that Mr. Ziauddin may have suffered a mild traumatic brain injury in MVA 4 but he had made a very good recovery. He opined that Mr. Ziauddin's reported cognitive changes may be due to chronic pain and sleep deprivation rather than brain injury. In his first report, Dr. Hirsch opined that Mr. Ziauddin's decline in function in social, vocational, and recreational activities was causally related to all four MVAs, but he was hopeful that, with time, Mr. Ziauddin could return to his pre-accident level of functioning.
- [209] In his second report, dated January 13, 2021, Dr. Hirsch said that Mr. Ziauddin reported that his memory had progressively declined. Dr. Hirsch attributed that to sleep disturbance, ongoing pain and intermittent mood dysfunction, any of which can adversely affect mental processing.
- [210] Dr. Hirsch confirmed his earlier diagnoses, but his prognosis was more guarded. He wrote:

Following the implementation of the aforementioned recommendations [functional restoration program under the guidance of a kinesiologist, a nutritional therapist, treatment sessions with a clinical counselor, and judicious use of over the counter analgesic/anti-inflammatory medications], I would expect Mr. Ziauddin to make some symptomatic gains. However, in the context of his reported ongoing headaches, neck pain, and low back pain, the prognosis regarding complete resolution has to be viewed as guarded at this juncture.

[211] In direct-examination, Dr. Hirsch confirmed that his use of the term "guarded" had a negative connotation and that, four years post MVA 4, Mr. Ziauddin had all the same issues. He opined that Mr. Ziauddin's difficulties were probably not going to go away.

[212] In his second report, Dr. Hirsch said:

It appears that Mr. Ziauddin has the physical aptitude to continue [siding installation] or an occupation of similar physical demands full-time. However, I would not be surprised if Mr. Ziauddin were to miss the occasional day from work due to flare-ups of his axial skeletal pains in the foreseeable future.

[213] In cross-examination, Dr. Hirsch said that the caveat to his opinion was the use of the qualifier word "appears". His opinion was based on what Mr. Ziauddin told him. He testified that to truly assess Mr. Ziauddin's capacity, information was required from the people Mr. Ziauddin worked with about whether he was pulling his weight.

[214] Nonetheless, as Mr. Ziauddin had demonstrated, Dr. Hirsch opined that he was able to continue to work, in some capacity, in the future. Dr. Hirsch said he would not impose any medical restrictions on Mr. Ziauddin's future recreational pursuits, and that Mr. Ziauddin had the physical ability to perform all domestic tasks. Dr. Hirsch did not foresee the need for any homemaker assistance, special equipment, or surgical treatment.

Dr. Kulwant Riar

[215] Dr. Riar was qualified to provide expert evidence as a forensic psychiatrist.

[216] Dr. Riar assessed Mr. Ziauddin on March 1, 2021, for the purposes of providing a psychiatric opinion. He diagnosed Mr. Ziauddin as suffering from a somatic symptom disorder of mild to moderate intensity, and an unspecified anxiety and depressive disorder both resulting from the MVAs. Somatic symptom disorder is diagnosed when a patient is experiencing one or more symptoms that are distressing and causing significant disruption in their life. The patient's life revolves around thinking and worrying about the seriousness of their symptoms, causing anxiety, time, and effort to deal with the symptoms.

[217] Dr. Riar said that, after MVA 3, Mr. Ziauddin began using alcohol to deal with his pain, mood, and sleep issues, and that this continued after MVA 4. He said that Mr. Ziauddin recognized that he had been drinking too often and too much. He was still drinking when Dr. Riar saw him. Dr. Riar said that Mr. Ziauddin's problems relating to his symptoms of memory, concentration, and ability to focus were related to anxiety, depression, and

drinking rather than concussion. Dr. Riar concluded that, although Mr. Ziauddin had been disabled due to psychological issues for some time prior to the assessment, he was not disabled at the time of the assessment, and Dr. Riar "did not believe that Mr. Ziauddin was disabled for some time prior to his interview, but some aspects of his life were limited".

- [218] Dr. Riar opined that all four MVAs played a part in bringing on Mr. Ziauddin's somatic symptom disorder, which has been complicated by his ongoing anxiety, depression, and other psychological factors, including the ongoing stress of aches and pains, his drinking, and his personality profile.
- [219] Dr. Riar's prognosis was guarded for the four to six months following his assessment, but he felt that, with interventions, including 12 to 14 one-hour sessions of cognitive behavioural therapy and the use of psychotropic medication, the course of Mr. Ziauddin's illness could be changed and his functioning improved. In the long term, Dr. Riar expected that Mr. Ziauddin could achieve remission.
- [220] In cross-examination, Dr. Riar was asked why Mr. Ziauddin did not follow earlier recommendations for counselling and taking medication. He said it was not unusual for individuals not to follow psychiatric advice as they saw it as a negative connotation in their lives.

Functional Capacity Evaluation

- [221] Trevor Kyi was qualified as an occupational therapist to give expert opinion evidence in the area of functional capacity evaluations.
- [222] Mr. Kyi conducted a functional capacity evaluation ("FCE") of Mr. Ziauddin on April 29, 2021, and prepared a report dated May 6, 2021. His focus was on what Mr. Ziauddin could do durably with respect to work and life. By the term "durably", Mr. Kyi meant whether Mr. Ziauddin could keep it up.
- [223] In his report, and during his evidence, Mr. Kyi explained the tests he performed to test the reliability of what Mr. Ziauddin told him. He confirmed that Mr. Ziauddin showed high physical effort during the testing. Overall, Mr. Ziauddin's reports of pain related disability were reliable and consistent with Mr. Kyi's objective test findings. He said that Mr. Ziauddin tended to be optimistic and overestimate his ability and understate the full extent of his level of disability.
- [224] Mr. Kyi explained in his report that, to better screen for overall work durability, he administered various tests early in the functional capacity testing day and repeated them later in the day. He said that there were no significant declines in the re-testing for bilateral grip strength, bilateral shoulder range of motion, bilateral elbow muscular velocity, right knee swelling, or work productivity for tasks performed at an ideal work height. There were significant declines in low back range of motion, neck-shoulder, mid back, and low back muscular velocity, low back/hip/lower body strength and stability, gait pattern, walk speed, and productive work tasks, particularly those requiring sustained static body

posturing. There was also a significant increase in swelling in his left knee.

[225] Mr. Kyi opined at page 33 of his report:

Overall results suggest that while many aspects of FCE testing were well tolerated, more arduous aspects exceeded Mr. Ziauddin's physical capacity to some extent. Primary limitations related to Mr. Ziauddin's neck-shoulder, mid back, low back, and left knee regions. While he did have a mild headache during his workday, it was not functionally disabled during the FCE workday in question.

[226] Mr. Kyi opined that Mr. Ziauddin is currently working in construction more out of perseverance than out of physical suitability for the work. Although part-time construction work would be better than full-time, Mr. Ziauddin is not well-suited to construction work.

[227] As to Mr. Ziauddin's suitability for work as a cable service technician, Mr. Kyi noted that this work is generally lighter, and more suitable for Mr. Ziauddin. He opined that Mr. Ziauddin was not well-suited to the full spectrum of work tasks in this line of work, but it was somewhat more reasonable than construction work. Part-time work in this field would be highly preferable to full-time work to allow residual energy for the avocational aspects of Mr. Ziauddin's life.

[228] Mr. Kyi said, under cross-examination, that Mr. Ziauddin could lift up to 50 lbs for a durable work day and that Mr. Ziauddin is "not a highly disabled young man".

Economic Evidence

[229] Mr. Ziauddin called Christiane Clark, who was qualified as an Economist, to give evidence in labour economics with respect to earning estimates and cost of care multipliers. She prepared a report marked as Exhibit 15. I will deal with Ms. Clark's evidence in relation to Mr. Ziauddin's claim for past income loss and loss of future capacity.

Damages

Non-Pecuniary Damages

[230] The purpose of non-pecuniary damages is to compensate a plaintiff for pain, suffering, loss of enjoyment of life and amenities (*Trites v. Penner*, 2010 BCSC 882 at para. 188), and provide "reasonable solace for [the plaintiff's] misfortune": *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 636.

[231] The Court of Appeal outlined the proper approach to the assessment of non-pecuniary damages in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46. The factors to be considered include the plaintiff's age; the nature of the injuries; the severity and duration of pain; disability; emotional suffering; loss of enjoyment of life; the impairment of family, marital and social relationships; the impairment of physical and mental abilities; and loss of lifestyle.

- [232] A stoic nature is also to be considered, and a plaintiff's stoicism should not penalize him. I find that Mr. Ziauddin is relatively stoic, and his stoicism ought not to result in a lesser award.
- [233] I accept, on an assessment of Mr. Ziauddin's evidence and the evidence of the witnesses who testified about the impact of the MVAs on his functioning, that Mr. Ziauddin has suffered headaches, pain in his upper back and neck, resulting in anxiety, depression, and somatic symptom disorder. He also suffered injuries to his knee and a possible mild traumatic brain injury, both of which had resolved prior to trial. There is a psychiatric overlay to Mr. Ziauddin's injuries as a result of his anxiety, depression, and somatic symptom disorder. Although Mr. Ziauddin's reaction to his pain may be disproportionate to his physical symptoms, his pain still has a physical basis and his experience of it is real.
- [234] Mr. Ziauddin was a young man when he was involved in four accidents within 14 months. He is still a young man. He was extremely fit and athletic before the accidents. His accident-related neck, upper back, headache pain, sleeplessness, anxiety, and depression result in forgetfulness. These symptoms have had a significant impact on his ability to perform his work duties and have impacted his relationships with his family and friends. They have also changed his formerly outgoing sociable personality. He is less social and does not engage in his pre-accident recreational activities. He no longer participates in sports at a competitive level. He has a reduced capacity for work.
- [235] The expert medical doctors who testified opined that his accident-related injuries will continue to impact Mr. Ziauddin's function for life. Although Dr. Wong's report was optimistic about Mr. Ziauddin's return to full functionality, his optimism has not been borne out since his report which, by the date of trial, was more than four years out of date. Most importantly, Drs. Hirsch and Riar gave "guarded" prognoses for Mr. Ziauddin's recovery although Dr. Riar opined that, in the long term, Mr. Ziauddin could achieve remission.
- [236] On the other hand, Mr. Ziauddin testified that he is treating his pain with Advil and has not filled prescription medication since 2019. He last visited a chiropractor before the pandemic. He was involved in active rehabilitation once or twice a week and had some recent physiotherapy.
- [237] When it comes to awards for non-pecuniary damages in motor vehicle cases, there is no "tariff". An award must reflect the specific circumstances of each individual case: Lindal at 637. Mr. Ziauddin's counsel and counsel for the defendants other than ICBC, have presented authorities that they argue support their respective positions on what would be a fair assessment for non-pecuniary damages. While an assessment is an individual process, awards made in somewhat similar cases can be of assistance in arriving at a fair award for non-pecuniary damages. They do, however, serve only as a guide to what is appropriate compensation. In this analysis I must consider the pain, suffering, and loss of enjoyment experienced by Mr. Ziauddin. At the same time, it is important to remember that the award

must be fair and reasonable to both parties: *Trites* at para. 188.

[238] Mr. Ziauddin's counsel submits that an award of between \$125,000 and \$175,000 is appropriate for non-pecuniary damages. I have considered the authorities relied on and conclude that the following bear the closest similarity to the facts in this case:

- a) *Crozier v. Insurance Corporation of British Columbia*, 2019 BCSC 160: an award of \$125,000 to a 32-year-old plaintiff. She suffered spinal soft tissue injuries; chronic mid-back pain; pain in the neck, back, shoulders, rib and chest area; headaches; dizziness; and nausea. Her psychological injuries included post traumatic stress disorder together with symptoms of depression and anxiety; fatigue; and problems with concentration and memory. She may have suffered a mild traumatic brain injury but it had resolved by trial. At trial, she continued to experience back, rib and chest pains, headaches, fatigue, depression and anxiety related to the accident and driving. She was no longer the outgoing, joyful person she had once been. Her personal and family relationships deteriorated. Her injuries affected the physical work she did prior to the accident and her ability to pursue work as a massage therapist. Justice Saunders determined that there was a real and substantial possibility of her psychological condition improving, and possibly her pain syndrome. He took that into account in his award.
- b) *Quezada v. Quezada*, 2019 BCSC 1732: an award of \$125,000 to a plaintiff who was a nurse and who was 23 years old at the time of the accident and 27 at trial. At trial she continued to suffer from neck, shoulders, lower back, and right buttock pain. Her concussive symptoms had resolved. Her ongoing symptoms led to depression, anxiety and somatic syndrome disorder. She was not able to engage in household activities to the same extent as before the accident. When the plaintiff graduated, there were no full-time nursing positions, so she worked part-time as a home care nurse, intending to take a full-time position when available. She was off work for five weeks following the accident and on a graduated return for a further four weeks. Her injuries prevented her from working full time. Her prognosis was uncertain, but there was hope for improvement and likely that the improvement would enable her to work full time.

[239] Although Mr. Ziauddin also relied on *Niessen v. Emcon Services Inc.*, 2018 BCSC 1410, an award of \$170,000, and *Megaro v. Vanstone*, 2017 BCSC 2256, an award of \$175,000, the plaintiffs in those cases were considerably older than Mr. Ziauddin, the injuries were more severe, and the prognoses were direr.

[240] In response, counsel for the defendants submit that an appropriate award for non-pecuniary damages is \$75,000. In support, they relied on a number of older cases and cases where the injuries suffered by the plaintiffs were less significant than Mr. Ziauddin's. In all of the cases, the accidents were less severe, and the injuries had resolved significantly by trial. None of the cases relied on by the defendants resulted in an award of \$75,000, and the defendants do not explain how they arrived at this proposed award based on cases suggesting lower awards.

- [241] In particular, the defendants relied on cases in which the non-pecuniary damage awards ranged from a low of \$18,000 in *Lubick v. Mei*, 2008 BCSC 555 to a high of \$50,000 in *Harle v. Williams*, 2020 BCSC 1684.
- [242] In *Jacobs v. McLaughlin*, 2008 BCSC 483, an award of \$33,500 was made. I did not find this case helpful as the plaintiff was diagnosed with Multiple Sclerosis five months after suffering from the first accident. The plaintiff suffered a severe relapse in May 2006 following a third accident. Thus, the duration of injuries suffered in a second accident on January 25, 2005, were only considered up to the point of her MS relapse. Injuries in the third accident were "miniscule".
- [243] In *Woods v. Chahal*, 2008 BCSC 1555, a young, physically active plaintiff was awarded non-pecuniary damages of \$20,000. I did not find this case helpful as the plaintiff had returned to all of his physical activities within six months of the accident and broke his collarbone in 2007 during a soccer game.
- [244] I also did not find *Heffernan v. Charlish*, 2021 BCSC 1882, helpful as the plaintiff in that case had a pre-existing condition of low back pain due to a serious fall she had when she was in Grade 4.
- [245] In *Harle*, the plaintiff, who was about the same age as Mr. Ziauddin, was awarded \$50,000 in non-pecuniary damages as a result of injuries to the right side of his neck, right shoulder, and back. Prior to the accident, he had been physically active and in good emotional health. After the accident, his personality changed - he was withdrawn, short-tempered, and less sociable. The plaintiff's symptoms were ongoing after almost three years, but he had continued to do physically demanding work and had been able to continue to play hockey and golf, albeit at a reduced capacity.

Conclusion on Non-Pecuniary Damages

- [246] Having reviewed all of the cases relied on by the parties, I find that an appropriate award for non-pecuniary damages in this case is \$125,000.
- [247] As explained by Justice Adair in *Amaral v. Glasser*, 2020 BCSC 639 at para. 266:
- [266] . An award for loss of homemaking capacity is intended to reflect the value of the work that would have been done by the plaintiff but which he or she is incapable of performing due to the injuries caused by the accident. It is not dependent upon whether replacement costs are actually incurred. However, a cautionary approach is to be taken in assessing damages for loss of homemaking capacity to ensure the award is commensurate with the loss. See, for example, *Westbroek v. Brizuela*, 2014 BCCA 48, at paras. 72-78. Where homemaking can be done, although with pain, it may be more appropriate to reflect that in the award for non-pecuniary damages, rather than make a separate award for loss of housekeeping capacity.

- [248] In this case, I think it fair to conclude that Mr. Ziauddin has residual homemaking capacity. He helped out around the home before the accidents and his brothers have taken over some of those tasks to help him out. He is able to do laundry and vacuum but suffers pain doing so
- [249] In this case, I conclude that it is appropriate to include Mr. Ziauddin's claim for impairment of housekeeping duties in non-pecuniary damages award I have made.

Loss of Earning Capacity

- [250] Mr. Ziauddin seeks damages for loss of earning capacity as a result of the injuries he suffered in the accidents.
- [251] Assessing loss of earning capacity involves comparing the likely future of Mr. Ziauddin's working life if the MVAs had not occurred, with his likely future working life after the MVAs: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32.
- [252] Claims for both past and future loss of earning capacity are subsumed under an award of damages for loss of earning capacity, and are assessed in the same manner: *Falati v. Smith*, 2010 BCSC 465 at para. 39, *aff'd* 2011 BCCA 45. Past income losses are net of income tax and any amounts actually earned during the relevant period: *Insurance (Vehicle) Act*, s. 98; *Riding-Brown v. Jenkins*, 2014 BCSC 382 at para. 27.
- [253] Initially, the plaintiff must demonstrate both an impairment to earning capacity, and a "real and substantial possibility" that the impairment has resulted, or will result, in pecuniary loss: see *Donovan v. Parker*, 2014 BCSC 668 at para. 44; *Perren v. Lalari*, 2010 BCCA 140 at para. 32; *Grewal v. Naumann*, 2017 BCCA 158 at paras. 42, 48.
- [254] The purpose of an award for loss of earning capacity is to "provide the plaintiff with full compensation for all pecuniary losses ... to restore, as best as is possible with a monetary award, an injured plaintiff to the same position he or she would have been in had the negligence not occurred": *Grewal* at para. 42, quoting the remarks of the trial judge; See also *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185; *Sandher v. Hogg*, 2010 BCSC 1152 at para. 87.
- [255] Loss of earning capacity is quantified using either an "earnings approach" or a "capital asset" approach, depending on the facts of the case: *Perren* at para. 32. These approaches were summarized by the court in *Donovan*:
- [51] The earnings approach is generally used in cases where the evidence allows for easy measurement, such as in cases where the plaintiff had already embarked on a career path or had steady employment and a known rate of pay prior to the accident.
- [52] The capital asset approach is usually applied in situations where the uncertainty of the plaintiff's future renders quantification difficult. It asks whether the plaintiff's earning capacity, as a capital asset, has been diminished because a) the plaintiff has been rendered less capable overall of earning income from all types of employment; b) has been rendered

less marketable or attractive as an employee to future employers; c) has lost the ability to take advantage of job opportunities which might otherwise have been open to him; or d) is less valuable to himself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8. Although quantification under this heading may be more difficult, this does not mean that the assessment is entirely at large: the court should consider these factors and make findings of fact as to the nature and extent of the loss of capacity and its relation to the plaintiff's ability to earn income: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.

[256] Any assessment must account for both negative and positive contingencies to recognize the possibility that the assumptions on which the award is based may prove to be inaccurate: *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33 at 79, [1985] B.C.J. No. 2762 (S.C.), *aff'd* 49 B.C.L.R. (2d) 99, [1987] B.C.J. No. 1833 (C.A.).

[257] As the Court of Appeal said in *Grewal* at para. 49:

[49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[258] The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation. Ultimately, the court must assess these damages based on what is fair and reasonable in all of the circumstances: *Parypa v. Wickware*, 1999 BCCA 88 at para. 70; *Rosvold v. Dunlop*, 2001 BCCA 1 at paras. 11, 18.

Past Loss of Earning Capacity

[259] In *Gao v. Dietrich*, 2018 BCCA 372, the court set out the methodology for assessing past losses:

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

[35] In *Athey v. Leonati*, [1996] 3 S.C.R. 458, the Supreme Court of Canada addressed "the fundamental distinction between the way in which courts deal with alleged past events and the way in which courts deal with potential future or hypothetical events" (at para. 26). While past events must be proved on a balance of probabilities, hypothetical events and future events need not be proved on that standard.

- [36] A hypothetical or future event will be taken into consideration "as long as it is a real and substantial possibility and not mere speculation" (Athey at para. 27; see also Roust v. MacKay, 2018 BCCA 29 at para. 17). Establishing a real and substantial possibility means that any employment loss must be shown to be realistic, having regard to what the plaintiff's circumstances would have been absent the injury: Graydon v. Harris, 2014 BCCA 412 at para. 27. There must be an evidentiary foundation to the plaintiff's claim: Morlan v. Barrett, 2012 BCCA 66 at para. 59.
- [37] If the plaintiff establishes a real and substantial possibility, then the court must weigh the hypothetical or future event according to its relative likelihood: Athey at para. 27. For example, "if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk" (Athey at para. 27). In determining a fair and reasonable damage award, a court should make an assessment rather than a purely mathematical calculation: Grewal v. Naumann, 2017 BCCA 158 at para. 54.
- [38] In contrast, past events must be proved on the balance of probabilities, and once they are proved, they are treated as certainties: Athey at para. 28; Roust v. MacKay at para. 17. A court's conclusion regarding past events cannot be weighted according to its likelihood or probability: Athey at para. 28.
- [39] The rationale for distinct standards of proof for past actual events and past hypothetical events was explained by Madam Justice Rowles in Smith v. Knudsen, 2004 BCCA 613 at para. 29:

What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

[260] The starting point is to look at Mr. Ziauddin's historical earnings and his actual earnings during the period between the MVAs and the date of trial.

[261] In Christiane Clark's report, on page 16, she summarized the information available from Mr. Ziauddin's income tax returns as follows:

Information from Income Tax Returns

Gross

Net

Total

WCB

EI Benefits

Business

Business

Total

Taxes

EI

Year

T4 Earnings

Benefits

(CERB)

Income

Income

Income

Payable

Premiums

2010

\$672

-

-

-

-

\$672

2011

\$14,228

-

-

-

-

\$14,228

2012

\$11,374

-

-

-

-

\$11,374

2013

\$8,201

-

-

-

-

\$8,201

2014

\$9,926

-

-

-

-

\$9,926

2015

-

\$5,418

-

\$10,500

\$10,500

\$15,918

-

-

2016

\$2,920

-

-

-

-

\$2,920

-

\$55

2017

-

-

-

\$51,096

\$22,609

\$22,609

\$1,518

-

2018

-

-

-

\$47,514

\$19,806

\$19,806

\$957

-

2019

-

-

-

\$27,888

\$14,823

\$14,823

\$240

-

2020

-

-

\$14,000

\$40,286

\$11,307

\$25,307

\$2,029

-

[262] I accept that Mr. Ziauddin missed some work from his MVA injuries. However, on Mr. Ziauddin's evidence, it is difficult to determine how much work he actually missed, because he continued to work in some fashion and his memory for this kind of detail was poor. Some of his employers were called to testify about his work for them and his time off after various motor vehicle accidents. That evidence was helpful.

[263] In 2017, Mr. Ziauddin testified that he was no longer able to do siding installation and he began doing work with Progressive as a cable installer. Mr. Khalid's evidence was that Mr. Ziauddin worked for Progressive from January 13, 2017, to May 6, 2018, and again from October 5, 2019, until January 10, 2020. His work as a cable installer was interrupted by COVID-19 and customers' reluctance to have servicepeople enter their apartments.

- [264] On one occasion, Mr. Ziauddin earned income that was not reported. Ghulam Shah testified that he paid Mr. Ziauddin \$4,000 in 2016, which does not appear either as T4 income or business income in Mr. Ziauddin's 2016 tax return. His reported income in 2016 dropped to \$2,920. But in 2017, Mr. Ziauddin's gross business income went up to \$52,096. His net income for that year was \$22,609, but I have no evidence about the business deductions Mr. Ziauddin took when calculating his net business income.
- [265] On the evidentiary record, it is difficult to determine what Mr. Ziauddin could have earned, not what he would have earned, but for his injuries.
- [266] I do have evidence that in the 16 weeks before MVA 1, Mr. Ziauddin worked full time installing cable.
- [267] Mr. Ziauddin submits that he has shown that he had the capacity before the accidents to earn \$17 an hour, and work 40 hours per week as a siding installer. He did so for 16 straight weeks with L2 Exteriors just prior to MVA 1. In that period, he earned approximately \$10,500 as reflected in his 2015 income tax return. Had he not been injured, and had he continued to work with L2 Exteriors at the same hourly rate, he would have earned \$34,000 in that year. That earning capacity is consistent with the figures set out in table 3 of Ms. Clarke's report at page 16, which considers the statistics for the average siding installer under her "risk only" contingencies. Risk only contingencies account only for the average probability that a BC male could be forced out of the labour market, unemployed, or work part time. It is compared to "risk and choice" contingencies which consider the average probability that a BC male may choose to be out of the labour market in addition to the risk factors.
- [268] I am satisfied that it is appropriate to only consider risk contingencies as it is not probable that, given his family responsibilities, Mr. Ziauddin would choose to be out of the labour market. Despite his varied work history since the accidents, which involved a number of employers and business partners, on a balance of probabilities, I find that Mr. Ziauddin wanted, and perhaps needed, to work full time.
- [269] I conclude that it is probable that Mr. Ziauddin would have continued to work as a siding installer, from the date of the first accident. In accordance with Ms. Clark's report at page 16, applying risk only contingencies, his earnings to the date of trial would have been \$214,027.
- [270] Based on his income tax records for 2016 to 2020, Mr. Ziauddin's net earnings were \$85,465, and his gross earnings for 2021 were \$40,832. From Mr. Shah's evidence, Mr. Ziauddin's 2021 gross earnings were more than he should have earned for the actual work he performed. I also note that the figure included expenses.
- [271] Mr. Ziauddin seeks \$87,730 for past wage loss. He arrives at that figure by taking the \$214,027 calculated in Ms. Clarke's report, less \$85,465, his actual earnings to the end of 2020, and less his 2021 gross earnings of \$40,832 in 2021.

- [272] The defendants submit that an appropriate award for past wage loss would be Mr. Ziauddin's reported net business income for 2016, \$22,609. They did not provide an analytical basis for their submission.
- [273] I have concluded that an appropriate award for past wage loss is \$75,000. I have reduced the amount claimed by Mr. Ziauddin based on negative contingencies, including the evidence that, on at least one occasion, Mr. Ziauddin earned income that was not reported for tax purposes and because his evidence was not always clear about how much time he actually took off as a result of his injuries. My overall impression was that, despite his injuries, Mr. Ziauddin worked more than his doctors recommended. I have also considered the fact that some of Mr. Ziauddin's time off from his work as a cable installer was related to COVID-19, not to his accidents. In my assessment, I have considered positive contingencies including the probability that, but for the accidents, Mr. Ziauddin would have participated in sharing the profits from the contract Mr. Ziauddin obtained and Mr. Shah completed.

Loss of Future Earning Capacity

- [274] In *Rab v. Prescott*, 2021 BCCA 345, at para. 47, Justice Grauer set out a three-step process for assessing future income loss:
- [47] a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in *Dornan* at paras 93-95.
- [275] The court must then determine if the proposed damages award is fair and reasonable.
- [276] The three-part process in *Rab* is particularly applicable where the evidence indicates no loss of income at the time of trial: paras. 29, 47. That is not the case here. In these reasons, I have found an ongoing loss of income at the time of trial.
- [277] For clarity, I find that the first and second steps set out in *Rab* for an award of loss of future earnings capacity have been met: see, for example, *Montazamipoor v. Park*, 2022 BCSC 140.
- [278] The defendants do not dispute that Mr. Ziauddin is entitled to compensation for loss of future earning capacity.
- [279] The only issue left for the court to resolve is the assessment of the value of the future loss.

- [280] The defendants submit that, based on the capital asset approach, Mr. Ziauddin's damages should be assessed at \$50,000. Mr. Ziauddin submits that, based on an earnings approach, his damages should be assessed at \$696,067.
- [281] In my view, the earnings approach should be applied in this case as Mr. Ziauddin had embarked on a career path and there is mathematical evidence that can be used to demonstrate Mr. Ziauddin's loss.
- [282] Mr. Ziauddin has had a varied work history since leaving school. I accept that until just before MVA 1, his primary focus was on elite soccer and, at various points, his dreams were for a future as a professional soccer player and, as he got older, as a soccer coach either of a team or in a soccer academy. His claim for loss of future capacity is not based on a career in soccer. But his focus on soccer does explain why, on the date of MVA 1, he was embarking on a career.
- [283] Prior to his work with L2 Exteriors, he worked for short periods at various low-paying, part-time jobs that were not predictive of his future employment. After his father's death, he was focused on his new role in the family.
- [284] On the date of MVA 1, he was working full time as a siding installer. By all accounts, it is a physical job involving bending, stretching, kneeling, twisting, and carrying sheets of siding for the purpose of cutting them to fit and then installing them.
- [285] Arguably, had he not been injured, and continued to work at L2 Exteriors in the years following MVA 1, at the same rate and for the same number of hours, he would have earned \$34,000 a year.
- [286] While Mr. Ziauddin has returned to this work after his MVAs, he has struggled to keep up with the demands of this work and has frequently missed work, arrived late, and took breaks in the middle of the day. Despite help from others, he has not been able to keep up, and at the end of a work day has no reserves left for the avocational aspects of his life.
- [287] The value of the estimate of earnings of siding installers on a "risk only" contingency as set out at table 3, page 16 of Ms. Clark's report, is \$1,392,134 to age 70. Mr. Ziauddin submits that his future capacity is half of what it was prior to the accidents and, as a result, he seeks an award of \$696,067.
- [288] I did not hear any evidence from Mr. Ziauddin about his desire to work to age 70 and was not provided any statistical information about the average age of retirement from that field of construction work. I do not think there is a real and substantial possibility that Mr. Ziauddin would work to age 70. Rather, I would set his retirement age at 65.
- [289] In this case, the medical experts who testified expect Mr. Ziauddin to make a full recovery at some point.

- [290] Dr. Wong, who has treated Mr. Ziauddin after each of the MVAs, opined in April 2017 with respect to Mr. Ziauddin's knee pain, "[e]ventually I would expect a return back to full pre-MVA capabilities". It appears that he was right in that opinion as, at trial, Mr. Ziauddin's knee issues had substantially or completely resolved. There was some swelling of his knee at the end of the FCE, but it did not appear to be of significant concern.
- [291] With respect to Mr. Ziauddin's general disability, Dr. Wong said that he would expect his level of ability to improve over time, eventually reaching pre-MVA abilities. Although Mr. Ziauddin's recovery appears to have taken longer than Dr. Wong expected, as he was still symptomatic at trial, Dr. Wong did not provide a follow-up opinion, revising his prognosis.
- [292] Dr. Hirsch gave a more guarded prognosis after his second assessment of Mr. Ziauddin. He said that his ongoing neck and back pain would probably negatively impact Mr. Ziauddin's level of function, "in particular his pursuits of sporting recreational activities, at least in the short-term". However, he did not impose any medical restrictions on those pursuits. He opined that it was unlikely that Mr. Ziauddin will develop degenerative arthritis in his neck, back, or left knee.
- [293] Mr. Kyi opined, based on his FCE, that Mr. Ziauddin was not a highly disabled man.
- [294] Dr. Riar opined that Mr. Ziauddin had not sustained any concussion or head injury in MVAs 1-3, and did not suffer symptoms suggestive of concussion after MVA 4. He opined that there was a likelihood that Mr. Ziauddin suffered a mild concussion in MVA 4 but did not suffer any long-term effects.
- [295] With respect to Mr. Ziauddin's somatic symptom disorder, anxiety, and depression, Dr. Riar opined that they continue to exist due to a lack of treatment and Mr. Ziauddin's drinking issues. He recommended that Mr. Ziauddin start doing regular active exercises, which would be beneficial for both his emotional symptoms and physical discomforts. He recommended psychiatric interventions after counselling for alcohol abuse. He opined that for four to six months, Mr. Ziauddin's prognosis was guarded but with interventions, the course of his illness could be changed and his functioning could be improved.
- [296] Taking these medical opinions into account, I find that there is a substantial likelihood that both Mr. Ziauddin's physical and mental health will improve, and that will have a positive effect on his future income. I also note that Mr. Ziauddin has demonstrated that he is resourceful at finding work and opportunities from among his close-knit community. Many of his jobs have involved friends and contacts from the Afghani community. He is clearly personable and has a supportive family. I expect that he will be able to find work that is suited to his remaining physical limitations such that his future income earning capacity is protected.
- [297] In light of the positive contingencies, especially that Mr. Ziauddin's physical and mental health will improve, I am satisfied that a 60 percent contingency reduction applies.

[298] As set out below, I am allowing Mr. Ziauddin's claim for a vocational assessment and vocational consulting. I expect that working with such a counsellor will provide Mr. Ziauddin with career options that may be more suited to his physical limitations. On the evidence, he is clearly capable of working, although not full time.

[299] Mr. Ziauddin's earnings until age 65, at half capacity, amount to around \$600,000. I would reduce this amount by 60 percent to account for the positive contingencies outlined above, resulting in an award of \$240,000. In my view, that is a fair and reasonable assessment of Mr. Ziauddin's loss of income earning capacity.

[300] Taking all these contingencies into account, and using 65 as Mr. Ziauddin's probable retirement age, a fair and reasonable assessment of Mr. Ziauddin's loss of income earning capacity is \$240,000.

Cost of Future Care

[301] The court assesses the cost of future care on a standard of the balance of probabilities: Athey at para. 28. In *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41, the Court of Appeal affirmed that an award for the cost of future care is "based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff".

[302] In this case, Dr. Riar recommended that Mr. Ziauddin undergo counselling for 14 sessions. Although previously reluctant to undergo counselling, Mr. Ziauddin said that he is prepared to do so.

[303] In addition, Mr. Kyi recommended the following:

- a) 15 sessions of kinesiology at \$95 per session for a total cost of \$1,425;
- b) four initial sessions with a dietician followed by a number of monthly follow- ups for a total cost of \$1,350, inclusive of taxes;
- c) referral to a Vocational Rehabilitation Consultant for a Transferable Skills Analysis at a cost of between \$900 and \$1,400 (plus GST) followed by six to eight sessions of vocational counselling at a cost of between \$630 and \$840 (plus GST);
- d) a high back Obusforme back support at a cost of \$89.95 (plus taxes), to be replaced every three to five years;
- e) an orthopaedic pillow at a cost of \$50-200 (plus taxes), to be replaced every two to three years; and
- f) a cryo-cuff knee icing device at a cost of \$257.98 (plus taxes), to be replaced every five to seven years.

- [304] The defendants and ICBC agree with all of the recommendations outlined by Mr. Kyi. In addition, they agree with the amounts claimed for items a) and b) above. The defendants and ICBC suggest that the amounts claimed for vocational assistance, as set out in item c) above, be awarded at the higher end of the range suggested by Mr. Kyi.
- [305] With respect to the amounts claimed in items e) and f) above, the defendants and ICBC suggest that the replacement would occur at three and seven years respectively.
- [306] In his submissions, in an effort to be conservative, Mr. Ziauddin only claimed a one-time purchase of the medical devices suggested by Mr. Kyi. In total, inclusive of counselling, Mr. Ziauddin claimed \$7,652.93.
- [307] Based on the defendants' submissions, supported by ICBC, they suggest an estimated cost of future care for Mr. Ziauddin at \$9,964.88, inclusive of taxes.
- [308] After considering the submissions, I find that there is a real likelihood that Mr. Ziauddin will take advantage of the future care items recommended by the doctors and other experts who have recommended them. I find that a fair and reasonable amount for the cost of future care should be set at \$12,675, inclusive of taxes. In that respect, I have awarded all of the amounts for items in a)-f) above and included \$2,800 for counselling.
- [309] All of Mr. Kyi's recommendations are medically justified, and none would have been required or would have been incurred but for the MVAs.
- [310] I have also concluded that, in accordance with Dr. Riar's recommendations, Mr. Ziauddin would benefit from counselling. As early as mid-2018, Dr. Wong recorded that Mr. Ziauddin was suffering from anxiety and low mood. He prescribed him antidepressant medication and suggested counselling. Mr. Ziauddin attended one counselling session. He testified that he did not feel comfortable talking and said that his general personality was that he did not really talk much, he listened more than he talked, and did not share his private life with anyone, not even with his family.
- [311] Nonetheless, Dr. Riar said in his report that Mr. Ziauddin recognized that he was suffering from low mood and anxiety, which Dr. Riar believed was related to Mr. Ziauddin's problems with memory, concentration, and ability to focus. He also noted that Mr. Ziauddin had turned to alcohol to self-medicate. Mr. Ziauddin had cut down his drinking by the time he saw Dr. Riar in March 2021 but had not stopped.
- [312] Dr. Riar opined that his unspecified anxiety and depressive disorder continued to exist due to lack of treatment. Dr. Riar recommended referral to a psychiatrist or a psychologist for 12 to 14 one-hour sessions for cognitive behavioural therapy to address his anxiety, depression, and alcohol abuse.
- [313] In all the circumstances, and in light of Mr. Ziauddin's expressed willingness to now attend counselling, I have included that in this award of future care costs.

Special Damages

[314] At the outset of the trial, the parties agreed that Mr. Ziauddin was entitled to special damages in the amount of \$3,315.70.

Summary of Awards

[315] For the foregoing reasons, I have awarded Mr. Ziauddin damages totalling \$455,990.70, broken down as follows:

- a) for non-pecuniary damages, including loss of housekeeping capacity, the sum of \$125,000;
- b) for special damages, the agreed-upon sum of \$3,315.70;
- c) for past loss of earning capacity, the sum of \$75,000;
- d) for future loss of income earning capacity, the sum of \$240,000; and
- e) for the cost of future care, the sum of \$12,675, inclusive of taxes.

Costs

[316] If, based on these reasons, or other events about which I am not aware, there is a dispute as to costs, the parties may seek to appear to speak to costs.

"MacNaughton J."

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