# THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wallman v. John Doe,*
2014 BCSC 79

Date: 20140117
Docket: M084600
Registry: Vancouver

Between:

**Daniel Wallman**

Plaintiff

And

**John Doe, Jack Doe Company Ltd.,**
**Insurance Corporation of British Columbia,**
**Rajinder S. Gill, British Columbia Transit, Whistler Transit Ltd.**

Defendants

Before: The Honourable Mr. Justice G.C. Weatherill

## Reasons for Judgment

| | |
|---|---|
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| Counsel for the Defendant Insurance Corporation of British Columbia: | P. Arvisais |
| Counsel for the Defendants Rajinder S. Gill, British Columbia Transit and Whistler Transit Ltd. | Scott B. Stewart<br>Ken Armstrong |
| Place and Dates of Trial: | Vancouver, B.C.<br>November 4-8, 12, 18-22, 25-29,<br>December 2-6, 9-11,<br>16-20, 2013 |
| Place and Date of Judgment: | Vancouver, B.C.<br>January 17, 2014 |

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## A. INTRODUCTION

[1] Occasionally a seemingly innocuous event can have tragic consequences.

[2] On the morning of December 4, 2006, the plaintiff, an emergency room physician, was driving his Honda Accord ("Honda") eastbound on Lorimer Road from his home in Whistler, British Columbia to the Whistler Health Care Centre ("WHCC"). It was cold and snowing. The roads were slippery. The traffic light at the intersection of Lorimer Road and Highway 99 (the "Intersection") was red in his direction. The plaintiff stopped.

[3] When the light turned green, the plaintiff began to move forward. However, a highway snow plow truck ("Snow Plow") proceeding northbound on Highway 99 slid into the Intersection, blocking the plaintiff's eastbound route.

[4] The plaintiff stopped. A Whistler Transit bus that had been following the plaintiff's vehicle (the "Bus") did not stop and rear-ended the plaintiff's vehicle (the "Accident").

[5] The collision did not cause much physical damage to the vehicles. However, the plaintiff's life changed instantly and dramatically. He claims to have suffered a debilitating concussion. He has not returned to his pre-Accident work either as a physician or as a developer of real estate rental properties. He asserts that he will never again be able to do so. He claims significant damages.

[6] The defendants, British Columbia Transit ("BCT"), Rajinder Gill ("Gill") and Whistler Transit Ltd. ("WTL"), (collectively the "Transit Defendants") say the Snow Plow is at least partly to blame. The Snow Plow and its driver have not been identified. The defendant, Insurance Corporation of British Columbia ("ICBC"), a nominal defendant pursuant to section 24 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, says that the Transit Defendants are to blame.

[7] There is no suggestion of any contributory negligence on the part of the plaintiff.

## B. THE PLAINTIFF'S CASE

[8] The plaintiff read into evidence excerpts from Gill's examination for discovery:

(a) On the morning of December 4, 2006, he was a relatively new bus driver for WTL having started in November 2006. He had little experience driving in snow.

(b) He was driving the Bus eastbound on Lorimer Road. There was only one eastbound travel lane. He had driven that route approximately seven or eight times previously.

(c) It had been snowing all morning and snow had accumulated on the roadway. Gill knew there was ice on the roadway under the snow. There was a slight down-slope to Lorimer Road as it approached Highway 99. This was the most snow Gill had ever experienced while driving a bus.

(d) Gill saw the Honda approximately 100 feet ahead of him. He saw that the traffic light at the Highway 99 Intersection was red. He saw that the Honda had come to a complete stop. The Bus was still moving.

(e) Gill saw the traffic light turn from red to green. He saw the Honda proceed forward approximately five to six feet and then come to a full stop because the Intersection was blocked by the northbound Snow Plow which had slid into it.

(f) The Bus was unable to stop and the bicycle rack mounted on the front of the Bus struck the rear of the Honda. The Honda was pushed further into the Intersection. Thereafter, the Honda did not stop but continued through the Intersection after the Snow Plow had passed.

(g) Gill and the plaintiff stopped on the east side of the Intersection, exchanged information and continued on their respective ways. Gill did not get out of the Bus. He did not inspect the vehicles for damage.

[9] The following witnesses testified as part of the plaintiff's case:

**(1) The Plaintiff, Dr. Daniel Wallman**

[10] The plaintiff is a 53-year-old physician. He obtained his medical degree from McMaster University in the mid-1980s. He worked in various hospitals in British Columbia until 1992 when he moved to Whistler to work as an emergency room physician at the WHCC.

[11] The plaintiff was born and raised in Ontario to parents who engrained in him the value and rewards of hard work and property ownership. He learned home maintenance skills at an early age.

[12] He excelled in school. In grade six he was moved to his school's enrichment program. He was the Canadian Junior Checkers Champion at age 13. He taught himself to play chess and shortly thereafter placed third in the Canadian Junior Chess Championship.

[13] The plaintiff excelled in sports. He was his school's "Athlete of the Year" in grade 12.

[14] During high school, university and during the summers in between, the plaintiff worked at various jobs, mostly labour intensive.

[15] In 1983, the plaintiff earned an undergraduate degree in honours chemistry from Queen's University, finishing second in his class. That summer, he attended a French-language immersion course in Quebec where his met his spouse, Dagmar Roth. He and Ms. Roth now have three children, Mathew born in 2004 and twins, Nicholas and Isabella born in 2008.

[16] The plaintiff decided upon a career as an emergency room physician at the WHCC because he loved the "high velocity trauma", the challenges and the busyness of the emergency room. He also liked the orthopaedics of sports-related injuries. The job gave him an opportunity to learn and develop his medical skills. The plaintiff found the job at WHCC to be gratifying and fulfilling. He was proud of

his accomplishments over the years, especially helping make a difference in the lives of his patients. He received thank-you letters from around the world. He had no plans to retire.

[17] The plaintiff typically worked approximately 60 hours per week at WHCC, 18 shifts per month. He was Chief of Staff in the mid-1990s. Thereafter he was President of the Medical Staff for four to five years. From 1997 until the Accident, the plaintiff was the medical advisor to the Whistler Ambulance Service.

[18] The number of shifts the plaintiff worked did not change after the birth of his son, Matthew in 2004. Although he and Ms. Roth were planning to have more children, he loved his work and had no plans to reduce his work hours.

[19] Financially, the plaintiff was very astute. He was a voracious reader of financial papers and publications. He loved detail. One of his strengths was math.

[20] The plaintiff and Ms. Roth purchased their first home in 1990. They subsequently moved twice, each time purchasing a new home and keeping the previous home for use as a rental property. They also acquired an interest in a family cottage at Wasaga Beach Ontario as well as other properties that they built or renovated and use as revenue properties. The plaintiff enjoyed the creativity involved in the design and seeing his renovation ideas come to fruition. He was the person primarily responsibility for the maintenance and repair of these properties.

[21] The plaintiff's plan prior to the Accident was to purchase and renovate approximately one property per year for as long as he continued to work at WHCC.

[22] The following is a summary of the plaintiff's real estate acquisitions prior to the Accident:

| Acquired | Address | Ownership | Current Equity (attributable to plaintiff/ Ms. Roth | Monthly Rental Income |
|---|---|---|---|---|
| 1990 | W. 14th Ave. Vancouver | 100% Professional Corp. | $170,662 | $1,400 |
| 1991 | Wasaga Beach, Ontario | 24.5% | $170,000 | $368.00 |
| 1992 | Casa Rio Dr., Kelowna | 100% Professional Corp. | $448,000 | $1,500 |
| 1995 | St. Moritz, Whistler | 100% Professional Corp. | $420,000 | $2,000 |
| 1996 | Family home, Whistler | 100% Ms. Roth | $636,000 | nil |
| 1997 | Glen Manor Triplex, Toronto | 50% plaintiff | $348,000 | $1,950 |
| 2001 | W. 7th Ave., Vancouver | 100% Ms. Roth | $1,166,000 | $3,350 |
| 2002 | Queens Ave., West Vancouver | 100% plaintiff | $1,138,500 | $2,750 |
| 2004 | Connaught Dr., Vancouver | 50% plaintiff<br>50% Ms. Roth | $3,704,000 | $9,300 |
| 2005 | Blue Mtn, Ontario | 100% Professional Corp. | $659,000 | $3,000 |
| 2006 | Dunbar St., Vancouver | 25% plaintiff<br>25% Ms. Roth | $339,000 | 1,975 |

[23] The plaintiff's pre-Accident health was good. His vision was excellent, he had lots of energy and he was an efficient sleeper needing only six to seven hours per night. He seldom took naps during the day. He has, however, suffered from asthma for many years, for which he takes prednisone, sometimes self-prescribed.

[24] In the late 1980s, the plaintiff injured his back in a car accident. In January 2004, the plaintiff hit his head during another car accident, which resulted in neck spasm and carpal tunnel syndrome in his arms. The plaintiff testified that both injuries had completely resolved by the summer of 2006.

[25] Prior to the Accident the plaintiff had never been diagnosed as having suffered a concussion injury.

[26] On cross-examination, counsel for the Transit Defendants pointed to ICBC's telephone records, which indicated the plaintiff was complaining of carpal tunnel syndrome problems in his hands arising from the January 2004 accident as late as November 24, 2006, ten days before the Accident. The plaintiff's recollection of those telephone calls was that he had called ICBC to obtain information about the protocol if, in the future, his carpal tunnel symptoms returned and he was required to have surgery and miss work. He believes that the person at ICBC who made the telephone notes misunderstood or misinterpreted what he had said.

[27] Regardless, none of the plaintiff's pre-Accident conditions or injuries resulted in the plaintiff missing work.

[28] The plaintiff enjoyed sports. He played baseball and hockey, skied, hiked and worked out in the gym. None of these activities were curtailed by the birth of Matthew.

[29] On the morning of December 4, 2006, the plaintiff left his home to attend an intubation course being held at WHCC. It was a cold and snowy day. He drove eastbound on Lorimer Road. There was black ice on the road. He stopped at the Intersection because the traffic light in his direction was red. He saw the Snow Plow travelling northbound on Highway 99. The traffic light facing the plaintiff turned green but he was unable to proceed through the Intersection because the Snow Plow had slid into and was blocking it. The plaintiff heard the sound of a roaring engine behind him. There was a bang and he immediately saw a flash of white light. He believes that his head must have "whipped forward and back" but has no memory of whether or not it did.

[30] The plaintiff's memory of the rest of that day is patchy. He has a vague recollection of being on the Bus and speaking to the driver but does not remember what was discussed. He has no recollection of preparing and having Gill sign a

statement regarding the Accident (the "Statement"). He confirmed that the Statement was written mostly in his handwriting and that one of the telephone numbers he wrote on it was an old residential telephone number from ten years earlier, not his current telephone number. However, he agreed on cross-examination that the old telephone number remains an active facsimile number in his house.

[31] He has no memory of speaking to a WTL representative on the Bus' radio or on the telephone later that day.

[32] He does not recall driving to WHCC. He does recall attending the intubation course after the Accident, one that he had prepared for and had been looking forward to attending, but was confused and could not follow what was going on. He did not feel well. He went home at the lunch break and fell asleep on his couch. He returned to the course in the afternoon, felt horrible and returned home. He has no recollection of anyone from WTL attending WHCC to speak to him that day.

[33] On cross-examination the plaintiff was questioned about the account of the Accident he gave during his examination for discovery and as recorded by various medical specialists with whom he had consulted. No two versions are identical. Some versions indicate he had a recollection that is missing or denied in others. The plaintiff's explanation is that, on each occasion, he was trying his best to piece together what he remembers happening with what he thought must have happened, even though he had no memory of the latter. For example, he testified that he has no memory of moving his vehicle after being struck or of preparing and having Gill sign the Statement. However, he knows those things must have happened because his vehicle was moved and the Statement was prepared.

[34] That evening, Ms. Roth took the plaintiff to WHCC to be examined. Dr. Rempel, a colleague at WHCC, diagnosed a concussion and advised the plaintiff to take some time off work.

[35] During the days, weeks and months following the Accident, the plaintiff was nauseated, confused and disoriented. His vision was blurred and he was seeing double. He was sensitive to light and noise. He had trouble remembering even simple things such as telephone numbers. He had constant, unbearable headaches. He easily became irritable. He had trouble understanding what was wrong with him. He was upset that he was unable to work. He was concerned that he might lose his medical license and skills as well as the trust of his colleagues. He minimized his symptoms in an attempt to convince his colleagues that he was fit to return.

[36] He felt exhausted and slept most of the day. He had graphic nightmares, which he described as always involving violence and blood.

[37] The plaintiff has no recollection of speaking to a representative of ICBC on December 19, 2006. He made no attempt to identify the driver of the Snow Plow, other than to retain the services of a lawyer who placed a small advertisement in the local Whistler newspaper asking that witnesses to the Accident come forward.

[38] Shortly after the Accident, Dr. Stanley, another WHCC physician, arranged for the plaintiff to undergo a CT scan at Lions Gate Hospital in North Vancouver. On the drive to the hospital he became nauseated and threw up.

[39] The plaintiff continues to suffer from most if not all of the foregoing symptoms. He has low-grade headaches that occasionally develop into migraines, although they are now less intense and more infrequent. His memory has improved but is not what it was before the Accident. He is not as confused and dizzy as he was during the first years following the Accident but still suffers from those symptoms. His sensitivity to noise and light has improved somewhat.

[40] The plaintiff continues to have difficulty thinking, concentrating, remembering things and multi-tasking, all of which he testified were his fortes prior to the Accident. He cannot seem to concentrate on more than one thing at a time. He has trouble

figuring things out and following simple instructions. He has blurred and double vision. He gets headaches and becomes irritable when he is tired.

[41] The plaintiff's daily life struggles include regularly forgetting or losing his wallet, glasses, cars keys and cell phone.

[42] The plaintiff provided the Court with several examples of becoming uncharacteristically distracted while minding his young children with the result that their safety was jeopardized.

[43] The plaintiff has difficulty initiating activities. On good days, he is able to spend up to 2 hours on the computer or 30 minutes doing physical activity, such as gardening and yard work. However, he finds that he becomes "symptomatic" - his headaches return, he develops a cognitive fog and he becomes fatigued, disoriented and irritable.

[44] On cross-examination the plaintiff was shown video surveillance of him doing various activities:

(a) January 18, 2008: Carrying his four year old son Matthew on his shoulders up three flights of stairs.

(b) July 20 & 21, 2010: Using a wheelbarrow and digging with a shovel to plant a cedar hedge at his Connaught Avenue property. This gardening activity did not appear to be particularly strenuous, yet the plaintiff paused several times to rest. He explained during his redirect examination that this activity resulted in him suffering a "brutal" migraine and he was required to pace himself in order to control his symptoms. In contrast, prior to the Accident it would have been inconceivable for him to have needed to rest while performing such a task.

(c) July 23, 2010: With his children and nanny at Brandywine Falls Provincial Park. He is seen carrying Mathew on his shoulders, but resting often. He explained that the nanny was present because he is

not sufficiently attentive to his children. Indeed, one scene shows his two-year-old daughter running along a path parallel to the water with the plaintiff seemingly oblivious that she had gone. The nanny chased after her.

(d) August 28, 2010: Playing in the water at Wasaga Beach in Ontario and riding on a jet ski with his son. The jet ski ride was far from vigorous.

(e) September 3, 2010: Doing various non-vigorous errands in Ontario, such as filling a car with gasoline.

[45] As a result of the Accident, the plaintiff has lost his acumen for math and detail. He provided the Court with several examples of instances where he wrote cheques with the wrong amount or date, or forgot to sign the cheque altogether. He has had duplicate cheques he wrote returned to him. His computer journal entries are now of poor quality and contain mistakes.

[46] Although the plaintiff has paid his taxes, he has not filed income tax returns for himself or for his professional corporation, Dr. Daniel A. Wallman Inc. (“Professional Corporation”), or completed financial statements for that corporation for several years. He testified that he finds the computer work associated with preparing the required financial ledgers and other information for his accountant onerous. It makes him symptomatic. It takes him months to correlate the financial information. He has not allowed others to do it for him because finds it difficult to accept a diminishing role in respect of matters that he feels he should be able to take care of himself.

[47] Initially, after the Accident, the plaintiff denied that there was anything wrong with him. He felt ashamed that he was not the productive person he was before the Accident. He wanted to return to work and to the life that he had made for himself.

[48] Between November 2007 and June 2008, the plaintiff tried working in the Squamish Hospital as a surgical assistant, a job requiring no decision making on his part. He performed a total of 13 surgical assists. He could not concentrate. His

hand-eye coordination was off. His suturing was amateurish. He found that his headaches, fatigue, disorientation, cognitive fog and irritability would return. He used the wrong codes for billing purposes. Two incidents caused him to cease this work. The first was being stopped by the police for erratic driving of which he was completely unaware. The second was when he arrived to assist late due to his inability to organize himself and the surgeon had to replace him with another doctor. In 2010 he performed one more surgical assist, but did not bill for it.

[49] In 2008 the plaintiff began working as a physician in a walk-in clinic in West Vancouver. He did so in an attempt to build up his tolerance as a stepping stone towards a return to work at WHCC. He worked approximately twenty shifts of four hours length during the fall of 2008 and spring of 2009. He was excited and thrilled to be working again. However, he found that two hours into his shift, he began to "fog over", have difficulty following what was being said to him, experience migraines and lose his coordination. He would be tired and disoriented for several days after a shift and would rest as much as possible. There was an incident in October 2008 where he prescribed a narcotic to a substance abuse patient. The plaintiff left the room then returned and prescribed the same drug to the same patient a second time. It was bizarre behavior that was completely out of character for the plaintiff. He has no idea why it happened. The incident made him begin to question his judgment. By November 2008, he decided to take a break from the walk-in clinic, due mostly to fatigue.

[50] In the spring of 2009, the plaintiff once again started working at the walk-in clinic. He continued to become symptomatic. On one occasion he froze and could not deal with a particular patient's relatively routine medical issue. He worked a few more shifts in January and February 2010 but stopped due to his symptoms.

[51] The plaintiff attempted many different treatments for his problems, some conventional, some unconventional. He has documented having paid $45,507.24 for these treatments. He has tried many different prescription drugs, some of which have helped while others have not. Some of his medications were self-prescribed, a

practice that the plaintiff agreed was frowned upon by his profession. Some of the drugs he tried had severe side effects. He did not keep any of the receipts for the purchase of these drugs. On cross-examination the plaintiff was shown records of his medication regime and consumption of prescription medicines. He was unable to explain why some of his prescriptions did not appear to have been filled while others were filled many weeks or months later. He speculated that he could have been given samples by the various prescribing physicians but he could not remember. He also speculated that he may have lost the prescriptions and did not want to ask for replacements for fear that his doctor would think he was not capable of returning to work.

[52] The plaintiff was concerned about taking some medicines (anti-depressants) because of the stigma associated with them, and others (Trazodone) because of their addictive nature. He did take them reluctantly.

[53] After many treatments by an Occupational Therapist (“OT”), Lori Nelson, and a psychologist, Dr. Jung, the plaintiff is learning to accept his limitations and that he will not be able to return to work as a doctor. He is beginning to understand that he has a brain injury and intends to do what he can to deal with it. He plans to continue with his OT and psychologist sessions.

[54] The plaintiff testified that, since the Accident, he has been unable to perform most of the maintenance and repair tasks required for his various rental properties. A handyman, Joseph Leblanc, handles those tasks for him. He pays Mr. Leblanc $20 per hour and allows him to live in one of the plaintiff’s rental units at a rent discounted by approximately $1000 per month.

[55] The plaintiff has not made any new investments in real estate since the Accident. He finds the process of researching properties and creating a vision of what he could do with them too overwhelming and stressful. He is no longer able to create designs for the properties. He gets caught up in minute issues. Even thinking about it and trying to run the numbers exhausts him.

[56] In approximately 2010, the plaintiff and Ms. Roth hired a full-time live-in nanny to assist with the children and household chores. They pay her $1,900 per month. They never contemplated the need for such assistance prior to the Accident.

[57] Since the Accident, the plaintiff no longer participates in sporting activities on a regular basis. He does not play hockey or baseball. He tried to ski once but only lasted one half day. He skates with his children but finds he has little endurance.

[58] On February 1, 2007, the plaintiff began to receive disability benefits from various insurers, totalling $8,042 per month. He will continue to receive these benefits until age 65. He has recently begun to receive CPP Disability Benefits, some of which will be clawed back by other insurers once they receive the appropriate information from the plaintiff.

[59] From his demeanour in the witness stand, particularly during cross-examination, it was obvious to me that the plaintiff easily becomes fatigued and confused. Overall, I found the plaintiff to be an honest, credible, sincere and forthright witness. His explanations for inconsistencies in various accounts and documents were logical and made sense. I do not doubt the plaintiff's veracity as a witness, especially his descriptions of his symptoms and the changes in his life, personality and capabilities since the Accident.

**(2) Dagmar Roth**

[60] Ms. Roth is the plaintiff's wife. They met thirty years ago in Quebec. They moved to Whistler in 1992.

[61] Ms. Roth was an elementary school teacher for 17 years until 2004 when Mathew was born.

[62] Ms. Roth testified about her life with the plaintiff before the Accident. She described him as one of the most well-rounded, intelligent people she has met. He had an enormous amount of energy, stamina and tenacity. He thrived on working

long hours and never missed a day of work due to illness. He never once complained of a headache.

[63] Although the plaintiff worked long hours, he was not motivated to do so by money. Rather, his motivation was the challenge associated with being a doctor and an investor in real estate.

[64] The plaintiff slept no more than 6 to 7 hours per night and worked an average of 60 to 70 hours per week. He worked even longer hours during the busy winter months. There was no change in the plaintiff's hours of work after the birth of Matthew in 2004. During the summer months, when the WHCC was less busy, the plaintiff spent more time planning, designing and renovating his various rental property projects.

[65] Prior to the Accident the plaintiff was strong and in very good health both physically and emotionally. He did not wear eyeglasses. Although he had some lower back pain from a car accident in the late 1980s, it never curtailed his activities. The carpal tunnel syndrome caused by a car accident in January 2004 did not seem to affect the plaintiff's abilities and had fully resolved prior to the Accident. In particular, the plaintiff was unaffected by it during the major renovation to the Dunbar property in 2006 on which he worked many hours.

[66] The plaintiff's productivity was very good. When he set out to do something, it was done effectively and efficiently. He did everything to the best of his ability and was hard on himself when he fell below this standard or made a mistake. Ms. Roth denied that she perceived the plaintiff to be someone with an "obsessive" personality. Rather, he was driven and liked to get things done efficiently and right. He set a high standard for himself.

[67] The plaintiff was extremely curious and was interested in detail. He strived to learn something new every day. He had amazing insight and was able to accurately and quickly assess the people around him.

[68] The plaintiff had an incredible memory, particularly for numbers. He never used a calendar or organizer, as he was able to keep everything he needed in his head. He was the main educator of their investment group. He condensed a complex investment strategy into easily understood language for his fellow investors.

[69] Ms. Roth testified that the plaintiff was “the brains” behind their real estate strategies and investments. He found the investment opportunities, did the financial due diligence, arranged and structured the financing, did the designs and general contracting and was heavily involved in much of the actual construction work.

[70] Beginning with the acquisition of their West 7th Avenue property in Vancouver in 2001, the plaintiff developed what became a good rapport with various construction sub-contractors in Vancouver. This relationship was strengthened by the renovations of their subsequently-acquired properties on Queen’s Avenue, Connaught Avenue and Dunbar Street. In Ms. Roth’s words, “we were really getting on a roll” building relationships with construction trades people who had knowledge of designs, ideas and specifications.

[71] At the time of the Accident, the plaintiff and Ms. Roth had planned to acquire new properties for renovation and rental at a rate of approximately one per year.

[72] Prior to the Accident the plaintiff liked entertaining and was a very good host.

[73] The plaintiff approached being a father as he did everything else -- fully committed. He was anxious to teach Matthew checkers and chess and to involve him in his construction projects.

[74] On the day of the Accident, the plaintiff returned home from WHCC at lunch time. He did not greet Ms. Roth or Matthew but rather went straight to the couch to lie down. This was very odd behaviour. Ms. Roth testified that he seemed distant and vague which was also out of character for the plaintiff. He did not mention that he had been in an accident. Approximately 45 minutes later, the plaintiff uncharacteristically left the house without any communication with Ms. Roth or Matthew. He returned home later that afternoon and again went straight to the

couch to lie down without saying anything. He refused to eat dinner, complaining of nausea.

[75] After dinner, Ms. Roth checked on the plaintiff. He said he had been in an accident but provided few details. His speech was subdued and without flow. He said he was tired.

[76] Ms. Roth immediately took the plaintiff to the WHCC where Dr. Rempel diagnosed a concussion and advised him to cancel his shifts. Ms. Roth had to arrange for others to cover his shifts because the plaintiff was unable to do so.

[77] Ms. Roth helped the plaintiff to complete forms and questionnaires relating to the Accident for insurance purposes but felt that what the plaintiff was telling her to write was what he thought had happened rather than what he actually remembered happening. She has yet to receive a “straight answer” from the plaintiff regarding the details of the Accident.

[78] In the week following the Accident, the plaintiff’s condition did not improve. He slept approximately 13 hours at night and napped during the day. He complained of violent nightmares, headaches, nausea and dizziness. He was agitated, moody and irritable. He mixed up simple words. He was forgetful and withdrawn.

[79] The plaintiff no longer interacted with Matthew the way he had prior to the Accident.

[80] During a meeting with an ICBC adjuster, the plaintiff lost his composure and began to cry, which was very unusual behaviour for him.

[81] In the months and years that followed, the plaintiff’s symptoms continued. He did not seem to have any insight into his condition. He refused to recognize his limitations and continually pushed himself beyond his capabilities resulting in his symptoms flaring up and him “hitting the wall and crashing”. He was irritable and

unkind to Ms. Roth. Living with him became unbearable. Their relationship deteriorated to the point where Ms. Roth was considering bringing it to an end.

[82] In 2010, a few of the plaintiff and Ms. Roth's close friends met to celebrate the plaintiff's 50$^{th}$ birthday. This event proved to be a turning point. Ms. Roth testified that their friends' speeches about and accolades for the plaintiff made her realize that she had to do more to help the plaintiff.

[83] Ms. Roth credits Ms. Nelson with the significant changes she has since seen in the plaintiff. He now seems to understand his condition and is better able to manage it using the strategies Ms. Nelson has provided. He still cannot function for a full day and needs constant rest. However, he is able to function cognitively for one to two hours and physically for approximately 30 minutes if he rests between activities. However, his former drive and stamina are still not present.

[84] The plaintiff's symptoms are minimized and he tends to feel better if he maintains a routine, manages his energy output, does not exceed his limitations and rests. If he does not, his symptoms return. He is slowly learning to cope.

[85] Changes in routine are difficult for the plaintiff. He becomes anxious and his symptoms of irritability and fatigue tend to flare up.

[86] Despite the improvements Ms. Roth has seen in the plaintiff, he continues to be easily distracted and forgetful. He mixes up words when communicating, repeats himself and finds it difficult to concentrate, all of which results in him becoming increasingly agitated, frustrated and exhausted. He often becomes emotional, has difficulty following a line of thought and goes off on tangents.

[87] The plaintiff is very inefficient at paperwork and financial matters. He wastes time and uses it illogically. He has trouble multi-tasking and initiating tasks or activities.

[88] The plaintiff remains involved in the maintenance and management of the rental properties, but to a much lesser degree than he did prior to the Accident. He does whatever he can within his limitations.

[89] The plaintiff is devastated that he is no longer able to work as an emergency room physician. His attempts to return to work doing surgical assists and at the walk-in clinic exhausted him. His symptoms of headaches, irritability, moodiness and inability to communicate flared up such that it would take him several days to recover from each shift.

[90] The plaintiff is shattered by the knowledge that his children are growing up with a father who has no role or reputation in their community.

[91] The plaintiff and Ms. Roth's social life has changed substantially since the Accident. The plaintiff no longer engages with people as smoothly as he did prior to the Accident. He is often inappropriate in his interactions and does not "filter out" what not to say. Socializing has become stressful for Ms. Roth. It is kept to a minimum as a consequence. Vacations are stressful and difficult due to the number of decisions that need to be made and the disruption to plaintiff's routine.

[92] In Ms. Roth's view, the birth of their twins in 2008 was a blessing that has given the plaintiff reason to carry on.

[93] Ms. Roth worries about the safety of her children when they are under the sole care of the plaintiff. She gave several examples of lapses in judgment on the plaintiff's part that resulted in a child becoming lost or injured. Ms. Roth was feeling incredibly burdened by having to assume the plaintiff's previous role in the family as well as her own. In May 2010, they hired a nanny, Ms. Flory Galigao, to assist. For the first few months she worked part time. Since September 2010 she has been a full-time live-in nanny. She does many of the household chores and assists the plaintiff when he has care of the children. In Ms. Roth's words, Ms. Galigao "helps us function".

[94] As they get older, the children are beginning to help out with small chores around the house.

[95] Ms. Roth expects that she will continue to require a nanny at least until the children are in school. The nanny is paid $16,800 per year net of her room and board.

[96] The plaintiff continues to take Advil, Tylenol, Ativan and Trazodone to alleviate his symptoms. He is not presently taking physiotherapy or massage therapy. He discontinued psychological counselling for approximately 15 months and has not returned to speech therapy despite a recommendation by Ms. Linde, a registered speech pathologist, that he do so.

[97] Ms. Roth testified that, but for the Accident, the plaintiff would likely have continued to work his previous work hours at WHCC and to manage their real estate investments. Ms. Roth would have been the primary caregiver for the children.

[98] I found Ms. Roth to be a sincere, straightforward witness who gave her evidence in an open, genuine, heartfelt and credible fashion. I accept her evidence in its entirety.

**(3) Dr. Paul Walden**

[99] Dr. Walden and the plaintiff worked as colleagues at WHCC for many years.

[100] Dr. Walden testified that the plaintiff was the hardest working physician at WHCC, working 18 shifts per month, several more than any other physician. The plaintiff staunchly protected his shifts and refused to give them up for other doctors.

[101] Dr. Walden described the plaintiff as an excellent emergency room physician. He was well liked and respected. The plaintiff seemed to love the fast-paced work and tolerated it well. Unlike other physicians at WHCC who would transfer patients to other doctors at the end of a shift, if the plaintiff started with a patient, he finished the job even though his shift may have ended.

[102] Dr. Walden testified that, as far as he was aware, the plaintiff had no physical or health issues prior to the Accident and certainly nothing that seemed to slow the plaintiff down. The plaintiff never mentioned any issue regarding numbness in his hands.

[103] He described the plaintiff as a "gracious host" at social occasions, someone who was engaging, was full of laughter and obviously enjoyed life.

[104] Dr. Walden saw the plaintiff on December 4, 2006 at the WHCC intubation course shortly after the Accident. Although the plaintiff did not seem confused, he was definitely quieter and less engaged than usual.

[105] Dr. Walden testified that the plaintiff is no longer the person he was prior to the Accident. For several years after the Accident the plaintiff insisted that his injury would resolve and that he would soon be back at work. However, it was obvious to Dr. Walden that the plaintiff had changed. In Dr. Walden's words, "something was gone". The plaintiff looked pale and dishevelled. He was quiet. His eyes were sullen and had a vacant look. It was as though his energy had been drained from him. There was no longer any laughter. Dr. Walden thought that the plaintiff was depressed.

**(4) Anne Townley**

[106] Ms. Townley is a nurse who worked at WHCC from 1992 to 2006. She testified that it was usually a busy, congested and noisy environment.

[107] She testified that the plaintiff was passionate about and proud of his work. He worked more and longer shifts than any of the other physicians at WHCC. If not on call, the plaintiff readily attended the WHCC if an additional doctor was needed. He always seemed to have a high energy level and was willing to work in the middle of the night if needed. He was very reliable.

[108] She testified that the plaintiff excelled at assessing injuries, suturing and fixing broken bones. He was always compassionate and was never angry with patients or WHCC staff, with whom he had a very good rapport.

[109] Ms. Townley testified that, as far as she was aware, the plaintiff had no health or physical issues prior to the Accident.

[110] She recalls that, on the day of the Accident, she was at work at WHCC and received a telephone call from the plaintiff. He sounded confused and vague. He was not himself. She suggested that he come to the clinic for an assessment. He did not arrive until after her shift had ended and she had left.

[111] The plaintiff has not worked at the WHCC since the Accident.

[112] Ms. Townley has seen and chatted with the plaintiff on occasion since the Accident. He would tell her that he was going to be returning to the WHCC soon, but he never did. On each occasion he seemed vague, confused and lacked energy. He “shuffled” rather than walked. His pre-Accident personality was gone. He was not his former self.

**(5) Dr. Douglas Carrie**

[113] Dr. Carrie is an anesthesiologist who works in the Vancouver area.

[114] He first met the plaintiff in 1991 when they worked together at a hospital in Inuvik.

[115] When Dr. Carrie returned to Vancouver in 1992 for his anesthesiology residency at the University of British Columbia, he began to see the plaintiff socially and they and their respective spouses became good friends. The group went on several vacations together.

[116] Dr. Carrie described the plaintiff as a confident individual who was extremely adept socially prior to the Accident. The plaintiff seemed to understand people and their personalities. He was a natural host.

[117] The plaintiff was very enthusiastic about his work at the WHCC. He seemed to enjoy the “rapid-fire” nature of emergency room work. He was very astute in his comments about his patients. He did not seem to slow down after his first child was born in 2004.

[118] The plaintiff took on ambitious house renovation projects that seemed to turn out well for him.

[119] Dr. Carrie described the plaintiff as an enthusiastic skier and member of Whistler’s Ski Patrol where his role was “Doctor on Mountain”, a role he discontinued in 2004 after his son was born.

[120] Dr. Carrie is aware that the plaintiff had chronic lumbar back pain prior to the Accident that bothered him from time to time but he observed that it did not seem to interfere with his ability to function.

[121] The plaintiff was the major advocate of and driving force behind the formation of an investment club comprising the plaintiff, Dr. Carrie, their respective spouses and two other couples. The plaintiff was always extremely well prepared for his presentations at their meetings and was a skillful interrogator of others who made presentations.

[122] The plaintiff has not been the same since the Accident. He seems to be “off”. He fatigues easily and withdraws from conversations.

[123] The plaintiff became less interested in the investment club. He appeared indecisive and less capable of handling its day-to-day management and accounting. He was not as skillful at critiquing the presentations of others. His presentations lost their “wow” factor and became rather dull and uninspired.

[124] The plaintiff is less enthusiastic about life and less capable socially. He misreads situations that confront him. He is much less confident that he used to be. His concentration seems to fade in and out.

[125] The plaintiff’s energy level is reduced. The plaintiff has declined Dr. Carrie’s invitations to go skiing and golfing.

[126] The plaintiff continues to be a skilled host but his guests are careful not to stay too long.

[127] Dr. Carrie testified that he has not noticed any improvement in the plaintiff in the last several years, and that the plaintiff has not returned to normal.

**(6) Kathryn Seely**

[128] Ms. Seely is Dr. Carrie’s wife. Prior to the Accident she and her husband frequently socialized and travelled with the plaintiff and Ms. Roth.

[129] Ms. Seely described the plaintiff as an energetic, engaged, gregarious and jovial person who loved life and being around people prior to the Accident. He was interested in and supportive of Ms. Seely in her career as a lawyer and later as the advocate for the Canadian Cancer Society.

[130] As a host, the plaintiff was energetic, generous and full of spirit. He was the educator within their investment club, and his presentations always surpassed those of the other members.

[131] Ms. Seely never observed the plaintiff having any physical or cognitive difficulties prior to the Accident.

[132] She saw the plaintiff approximately one week after the Accident. She described him as a different person. He was tired, grimaced with pain, spoke slowly and appeared confused.

[133] In the months and years that followed, she noticed that the plaintiff took longer to do things and was slow and deliberate in his communication, as though he was trying not to lose his train of thought. He repeated himself. He fatigued easily and needed quiet time on his own. He was forgetful and unable to focus on too many stimuli at once. He was impatient.

[134] Ms. Seely stated that those observations of the plaintiff continue to the present, although Ms. Seely does not socialize with the plaintiff as much as she used to.

**(7) Dr. Thomas Jacobs**

[135] Dr. Jacobs and the plaintiff met in medical school in 1984. They became good friends.

[136] Dr. Jacobs testified that, prior to the Accident, the plaintiff was jovial and full of energy. He loved the excitement and unknowns of his work as an emergency room physician. He prided himself on this memory, which Dr. Jacobs described as “unbelievable”. As far as Dr. Jacobs knew, the plaintiff had no physical or cognitive impairments.

[137] Prior to the Accident, the plaintiff and Dr. Jacobs occasionally went bike riding, skiing and on vacations together. They also played hockey and golf together.

[138] In early 2006, Dr. Jacobs learned of an opportunity to purchase the house on Dunbar Street as a real estate investment. He asked the plaintiff whether he would like to participate. In May 2006, the property was purchased by Dr. Jacobs, the plaintiff and their respective wives in equal shares. Thereafter, the house was completely gutted and renovated at a cost of approximately $130,000. The plaintiff designed the renovation based on the renovation of his West 7$^{th}$ Avenue property. Dr. Jacobs and the plaintiff performed most of the physical work for the demolition. The plaintiff never complained of or appeared to have any problems with his hands. Dr. Jacobs and the plaintiff handled the bookkeeping and accounting for the investment.

[139] Dr. Jacobs testified that the plaintiff is significantly different from how he was prior to the Accident. He is subdued, less jovial and does not seem to want to talk to people. He has much less energy. His memory is poor, particularly with respect to details. They have not participated in any sports together.

[140] Dr. Jacobs has had to assume full responsibility for the bookkeeping and accounting in connection with the Dunbar property.

**(8) Charles (Ross) Genge**

[141] Mr. Genge is a retired R.C.M.P. officer and is currently an investigator for the Royal Bank of Canada. Mr. Genge met the plaintiff while stationed at the Whistler R.C.M.P. detachment. He, the plaintiff and their respective wives became close friends. They were the driving forces behind the formation of the "Conundrum" investment club.

[142] Mr. Genge testified that, prior to the Accident, the plaintiff was a fun, positive and engaging man who was a loyal friend. He had a high level of energy and always seemed to be involved in many different activities at once, worked long hours and was involved in real estate and stock investments as well as sporting activities. He always got things done. He did not seem to have much idle time and never expressed to Mr. Genge any desire to scale back his activities.

[143] The plaintiff's acumen for numbers was extraordinary. He made detailed presentations at the investment club with qualitative and quantitative analyses of investments and provided the template for the club's investment strategies.

[144] Mr. Genge observed the plaintiff in the WHCC both on and off duty as a police officer. He described the plaintiff as a very professional, thorough and engaged physician who handled difficult medical situations very well. It was obvious to Mr. Genge that the plaintiff loved and was passionate about his job. There was never a hint that the plaintiff was disgruntled or had a desire to retire.

[145] The plaintiff's pre-Accident health was good. Mr. Genge never observed anything that suggested to him that the plaintiff was suffering from any physical or cognitive problems.

[146] Mr. Genge saw the plaintiff three or four months after the Accident. In Mr. Genge's words: "he was a changed man…completely different than the man

I had known". He was quiet, disengaged, detached and withdrawn. He was no longer gregarious.

[147] Since then, Mr. Genge has continued to see the plaintiff approximately four to six times per year. The plaintiff has not improved. He complains of fatigue and withdraws from social occasions to lie down, which he had never done in Mr. Genge's presence prior to the Accident. He is much less proficient with numbers and seems to lose his train of thought. He is forgetful and unable to engage in a cohesive, thorough discussion. He goes off on tangents. He is much less focused and precise with things he is doing than he was prior to the Accident.

[148] In Mr. Genge's words, when he and his wife are together with the plaintiff and Ms. Roth, the plaintiff is "fourth in the room" whereas prior to the Accident he was the primary person in the room.

[149] In 2013, it took the plaintiff many months to deal with the dissolution of the investment club despite knowing that Mr. Genge needed to receive the payout of his investment for his son's education.

### (9) Dr. Ron Stanley

[150] Dr. Stanley received his medical degree in 1982 and has been working at the WHCC since 1987, formerly as Chief of Staff. He interviewed and hired the plaintiff in 1992 as an emergency room physician. The position requires someone who is not only qualified medically but who is physically and mentally sharp and can think quickly on his or her feet.

[151] In Dr. Stanley's view, the plaintiff proved to be an outstanding acquisition for the WHCC. His attendance record was excellent. He worked more shifts than any other doctor at WHCC. He was the first person that Dr. Stanley called in if the emergency room needed help. He was reliable, energetic and knew the procedures and his skills. His suturing skills were among if not the best Dr. Stanley had seen. He got along well with his patients and the WHCC staff. He was a regular and active

participant in the professional development programs held at WHCC. His opinions were well regarded by his colleagues.

[152] Prior to the Accident, Dr. Stanley considered that the plaintiff was in excellent health. He did not believe that the plaintiff had any physical or mental impairment. On cross-examination, Dr. Stanley recalled that the plaintiff had complained of numbness and tingling in his right hand. The plaintiff was referred to a neurologist who diagnosed carpal tunnel syndrome.

[153] There is no mandatory retirement age at WHCC. Dr. Stanley never had any discussion with the plaintiff regarding his retiring or moving away from Whistler.

[154] Socially, the plaintiff was outgoing and energetic. He was excellent both as a host and as a guest at social occasions and had a natural ability to converse. He was "a great guy to know and work with". He was one of the smartest people that Dr. Stanley associated with. He was also physically active.

[155] Dr. Stanley recalls that he treated the plaintiff in January 2004 after he had been involved in a car accident. Although the plaintiff said he had hit his head, Dr. Stanley made no diagnosis of a concussion.

[156] Dr. Stanley also treated the plaintiff on December 7, 2006, the day after the Accident. The plaintiff presented as pale and in pain. He complained of headaches, a low energy level, insomnia, confusion, nausea and neck and upper back pain. Dr. Stanley felt he was getting worse after the Accident rather than better. He diagnosed a concussion and referred him for an immediate CT scan at Lions Gate Hospital in North Vancouver to determine whether the plaintiff was suffering from anything that could be treated surgically. The CT scan was negative.

[157] In the months and years that followed, Dr. Stanley has seen the plaintiff only occasionally, approximately twice per year. He described the plaintiff as "totally different". He is not as energetic. He seems disinterested and without focus. He never responded to several invitations to attend functions, including professional "journal club" discussions. He tends to ramble in his conversations and change the

topic without getting to the point. Dr. Stanley now finds that he becomes frustrated when speaking to the plaintiff.

[158] The plaintiff has never returned to work at WHCC. Each year, the plaintiff's privileges at WHCC have been renewed because it was felt that he might be able to return in the future, albeit at least initially in a much reduced and shadowed role. The current consensus is that he will never return to WHCC.

**(10) Dr. Willem Vroom**

[159] Dr. Vroom is the senior deputy registrar at the College of Physicians and Surgeons of British Columbia. He sent a letter to the plaintiff in October 2008 intended to notify the plaintiff that the same patient had been prescribed a controlled drug by more than five physicians within a 30-day period.

**(11) Dr. Monica Rempel**

[160] Dr. Rempel is a family and emergency room physician who received her medical degree from the University of British Columbia in 1994. Since 1996, she has worked exclusively as an emergency room physician, initially at both Squamish Hospital and WHCC and now exclusively at WHCC.

[161] Dr. Rempel worked with the plaintiff at WHCC prior to the Accident. She described him as an extremely hardworking doctor who never missed work, indeed, he was aggressive about wanting to work. He was well respected at WHCC and in the community. He received more thank-you cards, flowers and chocolates from patients than the rest of the WHCC physicians combined. The plaintiff loved his work at WHCC and usually had a smile on his face.

[162] Dr. Rempel did not observe any physical impairment on the part of the plaintiff prior to the Accident. He never spoke about retirement.

[163] Dr. Rempel was the plaintiff's treating physician during the evening of December 4, 2006, when he and Ms. Roth attended the WHCC. He did not look well. He was confused about the Accident. During her examination, she checked

his limbs for numbness or weakness. The plaintiff had no complaints in this regard. She diagnosed that the plaintiff had suffered a concussion in the Accident. She advised him to rest at home and to take one week off from work.

[164] Dr. Rempel has only seen the plaintiff occasionally since the Accident. On those occasions he has appeared dishevelled, sullen and low on energy. His voice had an uncharacteristically flat tone.

[165] For several years after the Accident, the plaintiff continued to insist that he would return to WHCC. His shifts continued to be scheduled, with other doctors filling those shifts. Ultimately, his shifts were no longer scheduled, however his WHCC privileges continue to be renewed annually because the WHCC emergency doctors believe that removing them would be detrimental to the plaintiff's recovery.

**(12) Joseph LeBlanc**

[166] Mr. LeBlanc is a caretaker and handyman who began working for the plaintiff in 2005 at the Connaught Avenue property. He has continued to do renovations and odd jobs for the plaintiff on his various properties ever since. He lives in one of the units at the plaintiff's Connaught Avenue property, working as the resident caretaker in exchange for discounted rent.

[167] Mr. LeBlanc testified that, prior to the Accident, the plaintiff was an outgoing, friendly, positive and happy person who seemed to thrive when amongst people. The plaintiff knew what he wanted with respect to his properties and got things done. He was not one to second guess. He seemed to have limitless energy, doing many jobs well simultaneously. It seemed to Mr. LeBlanc as though there was nothing the plaintiff was incapable of doing. He never complained to Mr. LeBlanc of any physical issues or disability.

[168] Mr. LeBlanc testified that the plaintiff has not been the same since the Accident. He seems unhappy, withdrawn and not as comfortable with people. He is indecisive, struggles and takes much longer to get things done than he did before. He is now frustrating to work with and to be around. He forgets to buy supplies that

Mr. LeBlanc requests. He makes mistakes that he would never have made prior to the Accident.

**(13) Simon Learmouth**

[169] Mr. Learmouth has been a tenant in the plaintiff's Whistler condominium since 2000. Before the Accident he saw the plaintiff approximately once per year at the condominium as well as occasionally around the Whistler community. He described the plaintiff as an outgoing person with high energy and a good sense of humour. The plaintiff was punctual and thorough with any repairs to the condominium.

[170] When Mr. Learmouth first saw the plaintiff after the Accident, the plaintiff seemed to be "stunned", subdued, vague, lethargic and slow. He repeated himself. He was not the outgoing energetic person he had been prior to the Accident.

[171] Mr. Learmouth gave examples of attempts by the plaintiff to perform modest repairs at the condominium after the Accident which demonstrated that the plaintiff was confused and took much more than a reasonable time to complete the tasks.

**(14) George Martin**

[172] Mr. Martin is a certified general accountant. He has been the plaintiff's accountant since 1999. At that time, the plaintiff was five years behind in the filing of his income tax returns. Mr. Martin prepared and filed them.

[173] Since 1999, the plaintiff has typically filed his tax returns in batches, once every two to three years. Although he does not file his tax returns on time, he does submit his income tax payments on time.

[174] Mr. Martin testified that, prior to the Accident, the plaintiff had an exceptional command of the details of his various personal and investment transactions. Mr. Martin saw this as a unique trait among his clients, many of whom are physicians. In Mr. Martin's words, the plaintiff's ability to not only recall but also to manage details by knowing where they fit, years after the fact, was "amazing". He described the plaintiff's energy during their meetings as "relentless". He was as

mentally sharp at the end of a three-hour meeting as he was at the beginning of it. He never seemed to get bogged down in a problem. His ability to assimilate information and make decisions was “impressive”.

[175] The plaintiff incorporated his medical practice in 1999 and various of his assets were transferred into the Professional Corporation by way of a “section 85 rollover” which allowed the plaintiff to access the equity in certain of his real estate holdings and investment portfolio, tax free. He used that equity to acquire additional real estate investments.

[176] The plaintiff created “predictive models” for his stock and real estate investment strategies that Mr. Martin found to be remarkably accurate.

[177] For the period 2000 to 2010, the plaintiff’s personal real estate investments had net losses during five years and net gains for the other five years.

[178] Mr. Martin testified that, after the Accident, he observed that, although the plaintiff continued to have considerable ability to recall the details of transactions, he no longer seemed to possess the ability to manage those details. He cannot recall where particular expenses fit. He becomes jumbled in his communication and frustrated with his inabilities in this regard. He has difficulty making decisions and becomes “paralyzed”. He becomes fatigued and unfocused during their meetings.

[179] On cross-examination, Mr. Martin confirmed that the real estate investments owned by the Professional Corporation have had losses for tax purposes each year. However, Mr. Martin attributes some of the loss to depreciation expense.

#### (15) Dr. Kevin Bush

[180] Dr. Bush is a plastic surgeon at various Vancouver hospitals. In addition, since 1999 he has run a clinic in Whistler where he receives patient referrals from WHCC. Prior to the Accident, Dr. Bush received several referrals from the plaintiff, whom he described as a “high energy, bubbly” individual. The plaintiff never complained to Dr. Wells of any personal health issues or concerns.

[181] After the Accident the plaintiff changed. He lost his confidence and outgoing personality.

[182] On one occasion in 2007, the plaintiff assisted Dr. Bush during a surgical procedure at the Squamish Hospital. Dr. Bush found that the plaintiff's coordination and quality of work were below expectations. The plaintiff had a tremor in his hands and had difficulty grasping the suturing needle. The plaintiff's short-term memory was poor. Dr. Bush had to repeat instructions several times. The surgery was successful but it took the plaintiff much longer to perform tasks assigned to him than it should have.

[183] Although the plaintiff had only been scheduled for one surgical assist, Dr. Bush gave him the opportunity to continue with other surgeries that same day. The plaintiff advised that he was unable to continue due to a headache and fatigue.

[184] Dr. Bush is concerned about using the plaintiff for surgical assists in the future because of the quality and speed of the plaintiff's suturing and his poor memory.

[185] On cross-examination, Dr. Bush agreed that numbness and/or paresthesia in the plaintiff's hands could explain the motor skill issues Dr. Bush witnessed.

**(16) Dr. Neil Wells**

[186] Dr. Wells is a plastic surgeon who works with Dr. Bush at their Whistler clinic. He also practices at St. Paul's Hospital and Vancouver General Hospital, the referral centers for WHCC.

[187] Dr. Wells knew the plaintiff prior to the Accident through his work in Whistler and through various patient referrals he had received from him. He described the plaintiff as one of the more enthusiastic and energetic emergency room doctors he has met. He also described the plaintiff's referrals as consistently accurate and very good.

[188] The plaintiff never complained to Dr. Wells of having any personal health issues or concerns.

[189] After the Accident the plaintiff performed one surgical assist for Dr. Wells at Squamish General Hospital. Dr. Wells described the plaintiff's skills as "poor", "clumsy" and "slow". He had expected a much higher level of competence from an emergency-room doctor. At the end of the procedure, the plaintiff reported being fatigued.

[190] Dr. Wells testified that using the plaintiff for surgical assists in the future would not be advantageous to Dr. Wells although, if asked, he would be prepared to use the plaintiff as part of his transition back to work as an emergency room physician.

[191] Dr. Wells agreed that numbness and/or paresthesia in the plaintiff's hands could explain the plaintiff's clumsiness in the operating room.

**(17) Dr. Karin Kausky**

[192] Dr. Kausky is a family and sports-medicine physician. She obtained her Doctor of Medicine degree from the University of Toronto in 1988, completed a family practice residency at the University of Western Ontario in 1990, obtained her Certificate of the College of Family Physicians designation from the College of Family Physicians of Canada in 1990 and obtained a Diploma in Sports Medicine from the Canadian Association of Sports Medicine in 2007. She has been practicing medicine in Whistler since 1993. She is heavily involved with Alpine Canada and the Canadian National Ski Cross Team and related entities. One of her specialties is concussion injuries.

[193] Dr. Kausky was qualified as an expert in family and sports medicine with additional expertise in the diagnosis and treatment of concussions.

[194] Dr. Kausky has known the plaintiff since 1993 when she began practising in Whistler. They were colleagues at WHCC. Although they did not often work on the same shift, they frequently did rounds together. The Whistler medical community is small and she knew the plaintiff well.

[195] She described the plaintiff as a very enthusiastic participant in the WHCC with an excellent reputation in the community for giving good medical care.

[196] Dr. Kausky became the plaintiff's family and treating physician after the Accident. Her first consult with him was on December 27, 2006. She noted that he was easily distracted and hard to keep on topic. He seemed to have a decreased ability to process information. His voice inflection had flattened.

[197] Dr. Kausky's opinion is that the plaintiff suffered a concussion during the Accident. She bases her opinion on the following definition of a concussion:

> "an alteration of brain function following either a direct blow to the head or a transmitted force to the head. It is a metabolic injury to the brain rather than a structural or anatomic injury - an injury to how the brain uses or metabolises energy."

This definition if found in P. McCrory et al, "Consensus Statement on the Management of Sports Concussion: The 4th International Conference on Concussion in Sport Held in Zurich, November 2012" (2013) 47 Br. J. Sports Med. 250. Dr. Kausky described this as the most widely accepted consensus statement in North America.

[198] Dr. Kausky also testified with respect to the following, more outdated definition of mild traumatic brain injury ("MTBI") from J. Carroll et al, "Methodological issues and research recommendations for mild traumatic brain injury: the WHO Collaborating Centre Task Force on Mild Traumatic Brain Injury" (February 2004) 43 Suppl. J. Rehabil. Med. 113 at 115:

> MTBI is an acute brain injury resulting from mechanical energy to the head from external physical forces. Operational criteria for clinical identification include: (i) 1 or more of the following: confusion or disorientation, loss of consciousness for 30 minutes or less, post-traumatic amnesia for less than 24 hours, and/or other transient neurological abnormalities such as focal signs, seizure, and intracranial lesion not requiring surgery; and/or (ii) Glasgow Coma Scale score of 13-15 after 30 minutes post-injury or later upon presentation for healthcare.

[199] She explained that this definition is inapplicable to the plaintiff's situation because it is a reference to neuro-imaging, which looks for a different injury, for example a bleed.

[200] Dr. Kausky explained that a patient's inability to process information, as opposed to an inability to repeat learned information, is symptomatic of an alteration in brain function. The plaintiff demonstrated such an inability.

[201] In Dr. Kausky's opinion, the plaintiff continues to suffer from post-concussion syndrome with accompanying symptoms such as a headache approximately 70% of the time, 1 to 2 migraine headaches per week, markedly decreased energy, a sleep disorder, decreased memory, decreased concentration and capacity to cope with stressors, an inability to multi-task, a balance disorder and vestibular dysfunction.

[202] Dr. Kausky agreed on cross-examination that she was relying on the plaintiff's self-reporting for much of her diagnosis but pointed out that the plaintiff's reports were consistent with his objective symptoms.

[203] She testified that the plaintiff tended to minimize his symptoms, resisted her attempts to put limitations on his activities and wanted to return to work as soon as possible. He did not react well to Dr. Kausky's recommendation that he rest both mentally and physically.

[204] Despite Dr. Kausky discouraging the plaintiff from returning to work, he did some surgical assists and some shifts at a walk-in clinic. Neither of those attempts to return to work was successful, as Dr. Kausky had predicted.

[205] Dr. Kausky has told the plaintiff that he is not capable of returning to work as a physician due to his cognitive deficits, his inability to multi-task, his sleep disorder and his persistent headaches. It is her opinion that the plaintiff is unlikely to succeed in any occupation requiring higher cognitive function and multi-tasking in an environment with multiple stimuli.

[206] Although she has seen some improvement in the plaintiff's energy, memory and sleep disorder, it is Dr. Kausky's opinion that the plaintiff's recovery has plateaued. Any future improvement will likely be small and slow. He will likely require ongoing manual therapy (physiotherapy, massage therapy, chiropractic therapy) and a personal trainer. He may also require occupational therapy, counseling and the assistance of a neuropsychologist.

[207] Dr. Kausky pointed out that the plaintiff's symptoms will vary from day-to-day. She agreed on cross-examination that he would likely be able to perform activities such as yard work, carrying a child and jet skiing but opined that his ability to perform those activities would be intermittent rather than sustained.

[208] Dr. Kausky was an impressive witness who testified in a straightforward and credible manner. She handled herself extremely well on cross-examination. I have no hesitation accepting her evidence.

**(18) Laurie Nelson**

[209] Ms. Nelson has been an occupational therapist since 1982. She specializes in assisting in the rehabilitation of brain-injured people.

[210] Ms. Nelson met the plaintiff prior to the Accident when her son attended WHCC with a complicated fracture and when she needed emergency attention for a broken tailbone. She described the plaintiff as calm, thorough and supportive throughout. He provided excellent medical care to her and to her son.

[211] After the Accident, Ms. Nelson was retained to provide rehabilitation advice and assistance to the plaintiff. She visited the plaintiff at his Whistler home in late 2010 and early 2011. He demonstrated fatigue, pain, problems with thinking, poor decision-making and difficulty processing information. He had difficulty bringing his thoughts to a conclusion without direction. He seemed to be unable to initiate thoughts or actions on his own. The plaintiff demonstrated limited awareness of and insight into his cognitive problems.

[212] Ms. Nelson recommended that the plaintiff see a psychologist, that Ms. Roth obtain education on traumatic brain injuries in order to better manage the plaintiff and that the plaintiff begin a gym exercise program with the assistance of a rehabilitation assistant to increase his endurance and productivity.

[213] Initially, the plaintiff's focus was solely on his return to work. He saw no need for rehabilitation strategies or to limit his activities or pace. His reaction to Ms. Nelson was that if she was unable to resolve his difficulties so he could return to work, she was not of much value to him. He has subsequently developed better insight into his problems and now calls on Ms. Nelson for assistance.

[214] Ms. Nelson developed various strategies and coping mechanisms to assist the plaintiff to pace himself, prioritize his activities, become more productive and manage his daily life activities.

[215] Ms. Nelson continues to see the plaintiff approximately every three months. He is better than he was in 2010, but continues to struggle with decision making and pacing himself.

[216] Ms. Nelson and a rehabilitation assistant, Tracey Fisher, created a gym program for the plaintiff. The plaintiff worked in the gym with Ms. Fisher twice per week and on his own once per week. Ms. Nelson observed that the plaintiff consistently had difficulty pacing himself and seemed to overestimate his abilities. She attempted to teach him to slow down and pace himself. The plaintiff attended 96 gym sessions with Ms. Fisher but stopped them in June 2012. Ms. Nelson plans to reinstitute the gym sessions when the plaintiff has his life better under control.

[217] Ms. Nelson was an impressive lay witness who gave her evidence in a credible, objective and professional manner.

#### (19) Shari Linde

[218] Ms. Linde is a registered speech pathologist. She was qualified as an expert in speech and language pathology and communication disorders.

[219] In December 2010, Ms. Linde subjected the plaintiff to a battery of tests that are recognized and widely used by professionals in her field. Her expert report is dated December 27, 2010.

[220] Although some of the tests were based upon normative data for people with ages well below that of the plaintiff, others were standardized on a population that included individuals of the plaintiff's age. All of the tests provided Ms. Linde with a general indication of the plaintiff's communication abilities.

[221] Generally, the plaintiff's performance on the tests was either "below average" or "poor". Ms. Linde noted that the plaintiff tended to work very quickly on the tests and made some errors due to inattention to detail.

[222] The plaintiff demonstrated difficulty with higher-level reasoning, providing adequate detail when giving rationale for decisions, memory of verbal information and verbal and written communication.

[223] Based upon her 19 years of clinical experience (16 years at the time she tested the plaintiff), the plaintiff's test results and Ms. Linde's observations of him, Ms. Linde is of the opinion that the plaintiff has challenges with communication, including difficulties remembering new information and generating ideas verbally.

[224] Ms. Linde recommends that the plaintiff participate in up to 50 hours of speech-language treatment over his lifetime, the current rate for which is $125 per hour.

[225] Ms. Linde was an impressive, objective and professional witness who did well during intense cross-examination. I have no hesitation accepting her opinions regarding the plaintiff's communication deficits.

#### (20) Dr. Hugh Anton

[226] Dr. Anton is a physiatrist with extensive experience in the evaluation and treatment of patients with mild traumatic brain injuries. He was qualified without objection as an expert in that field.

[227] Dr. Anton provided the Court with four expert reports.

[228] In the first, dated January 20, 2011, Dr. Anton opined that the plaintiff suffered a MTBI (or cerebral concussion) in the Accident, as well as a possible injury to his vestibular (balance) system. He also opined that the plaintiff developed a post-concussive syndrome after the Accident secondary to his MTBI which has contributed to his ongoing symptoms and associated activity limitations and disability. In his opinion, it is probable that the plaintiff's ongoing symptoms have arisen from the direct effects of his MTBI. Psychological factors such as anxiety and depressed mood have complicated the plaintiff's post-Accident situation. Dr. Anton recommended that the plaintiff:

(a) be referred to a sleep disorder specialist to determine whether his sleep issues could be treated medically;

(b) be screened for anterior pituitary dysfunction;

(c) see a neuropsychologist to better identify the severity and nature of any residual cognitive impairments with particular regard to his previous work environment;

(d) try stimulant medications to assist in his fatigue issues;

(e) obtain psychological counselling;

(f) see an occupational therapist with experience in MTBI; and

(g) work with a kinesiologist to establish an exercise program to improve his tolerance for activity.

[229] Dr. Anton opined that the plaintiff would likely not be able to tolerate returning to work as an emergency room physician because it is cognitively demanding and requires functioning at a high level with a high degree of energy at a sustained and consistent level.

[230] In his second report dated January 28, 2011, Dr. Anton opined that the plaintiff was not competitively employable in any type of work.

[231] Dr. Anton's third report is dated September 15, 2011. His opinion regarding the plaintiff having suffered a MTBI during the Accident was unchanged. He opined that the plaintiff's ongoing symptoms and cognitive problems were likely the result of the interactive effects of several factors, including residual impairments from his MTBI, the effect of psychological factors on cognitive performance, headaches and fatigue. He opined that these contributing factors likely arose from the direct and secondary effects of the plaintiff's Accident-related injuries. He opined that there will be no further neurological recovery from the plaintiff's brain injury, that he will not be able to return to work as emergency room physician and that he will probably not be able to consistently and durably participate in any other type of medical practice in the future. At best, the plaintiff will be able to work only part time with flexible hours.

[232] Dr. Anton's fourth report is dated April 22, 2013. His opinion regarding the plaintiff's injuries and prognosis did not change. He opined that the most likely explanation for the plaintiff's persisting symptoms is a complex interaction of:

(a) the plaintiff being one of the small group of people who experience permanent sequelae after a MTBI;

(b) an untreated psychological condition such as depression, post-traumatic stress disorder or anxiety disorder; and

(c) another medical condition such as sleep disorder (unlikely), the effects of pain on cognitive function or an endocrine disorder.

[233] Dr. Anton was an impressive witness who gave his evidence and expressed his opinions in a clear, logical and exceedingly objective fashion. I accept his opinions in full and unreservedly.

**(21) Dr. Philip Teal**

[234] Dr. Teal is an expert in the field of neurology and has extensive experience in the treatment of patients with traumatic brain injuries. He was qualified without objection as an expert in that field.

[235] Dr. Teal was the plaintiff's treating neurologist from shortly after the Accident until 2010. During that period, he examined the plaintiff on seven occasions. At the various consultations, the plaintiff reported that some of his symptoms (mood, headaches, thinking and memory) were improving, although they were still not normal. This was the case until the consultation on March 2, 2010, when the plaintiff reported that he was doing poorly in many respects.

[236] Subsequently, in 2010, Dr. Teal was retained to provide a medical-legal report for the plaintiff. In that capacity, he prepared two reports, one dated March 3, 2011 and the second dated July 18, 2013.

[237] The plaintiff's symptoms, as reported to Dr. Teal, were consistent over the period of his clinical treatments and evaluations for medical-legal purposes, although his symptoms did vary in frequency and intensity.

[238] Dr. Teal's opinion is that the plaintiff suffered a MTBI with chronic post-concussion syndrome as a result of the Accident, which was the triggering event for all of his symptoms. Dr. Teal bases his opinion on the symptom complexes the plaintiff experienced shortly after the Accident and their persistence (with some variability), his short period of absolute posttraumatic amnesia for the events immediately following the Accident and his patchy memory of subsequent events over the next hour. He examined those factors in the context of the temporal relationship between the onset of his symptoms and the Accident, the consistency of the symptoms and the plaintiff's pre-Accident history of no headaches and of being able to function and multi-task at a very high level. Dr. Teal made this diagnosis at the first consultation on March 7, 2007, and it has not changed.

[239] Dr. Teal testified that he does not make such diagnoses lightly. He reached his opinion despite the fact that it is uncommon for individuals who sustain a MTBI to have persistent post-concussion symptoms years after the traumatic event.

[240] In Dr. Teal's opinion, the plaintiff has persisting residual cognitive impairment as a result of his MTBI and its sequelae. In addition, Dr. Teal's view is that the plaintiff sustained Benign Positional Vertigo and a Grade I or II whiplash-associated disorder.

[241] The only change in Dr. Teal's opinion over time was with respect to the plaintiff's ability to return to work as a physician. In his March 3, 2011, report Dr. Teal expressed the opinion that the plaintiff would be able to resume work in the future in some capacity as a physician but that any such future employment would require a paced environment with controlled hours. However, in his July 18, 2013, report, Dr. Teal opined that the plaintiff is not able to resume work as an emergency room physician due to the intensity of the work, the need to multitask, the stress of the environment and the need for rapid judgment, good concentration, attention and memory.

[242] Dr. Teal, too, was an impressive witness whose opinions were thorough, given objectively and of great assistance to the Court. I accept his opinions in their entirety.

### (22) Dr. Ronald Remick

[243] Dr. Remick is a clinical psychiatrist specializing in mood disorders. He was qualified without objection as an expert in that field.

[244] Dr. Remick had a consultation psychiatry practice at Whistler from 2001 to 2012. The plaintiff referred patients to him from time to time. Accordingly, he knew the plaintiff professionally prior to the Accident.

[245] Dr. Remick described the plaintiff's personality prior to the Accident as bright, inquisitive and energetic. He considered the plaintiff to be a very competent emergency room physician.

[246] After the accident Dr. Remick became the plaintiff's treating psychiatrist at the request of Dr. Kausky. He saw the plaintiff as a patient for the first time on April 22, 2008. He testified that the plaintiff was significantly and dramatically different than he had been prior to the Accident. The plaintiff was markedly anxious, disorganized, overwhelmed and frustrated. He seemed to have lost confidence.

[247] Dr. Remick's initial assessment of the plaintiff was that he had suffered a significant brain injury, that his symptoms were consistent with post-concussive syndrome and that his condition was neurological rather than psychiatric. He suggested that the plaintiff try different psychiatric medications to see if they would help his condition.

[248] Dr. Remick continued to see the plaintiff clinically four or five times per year until November 22, 2010. Throughout, the plaintiff was extremely reluctant to take any medication. The plaintiff reported that, due to side effects, he was not tolerating the drugs Dr. Remick had recommended or prescribed for his anxiety and depressive condition. Moreover, they provided little if any benefit for him. It appears that the plaintiff did not follow many of Dr. Remick's instructions or recommendations regarding use of prescription medicines. The ones he did use were taken reluctantly. In this regard, Dr. Remick noted that 15 to 20% of his patients are physicians. He has found that many of them have difficulty accepting the role of patient and routinely insist on controlling their own treatment. The plaintiff's conduct was not unusual.

[249] By November 2010, Dr. Remick concluded that there had been no significant change in the plaintiff and that none of the various medications for the plaintiff's anxiety and depressive symptoms had worked. He suggested that the plaintiff undergo a psychological assessment to determine whether his condition was psychological rather than biological.

[250] The constellation of the plaintiff's symptoms is such that, in Dr. Remick's opinion, the plaintiff has a cognitive disorder (post-concussive syndrome) due to the Accident as well as possible depressive and anxiety disorders. Dr. Remick conceded that he has only a limited understanding of post-concussive syndrome and would defer to the opinion of a neurologist.

**(23) Dr. Briar Sexton**

[251] Dr. Sexton is a neuro-ophthalmologist. She was qualified without objection in that field.

[252] The plaintiff was referred to Dr. Sexton by his optometrist. She examined him on December 20, 2011. She found that the plaintiff was suffering from convergence insufficiency (the eyes involuntarily drift outward as an object approaches the face). This is not a natural phenomenon. In Dr. Sexton's opinion, it was caused by trauma associated with the Accident.

[253] Although sight tends to degrade with age, Dr. Sexton is of the opinion that the plaintiff's near-sightedness was accelerated by the Accident.

[254] In Dr. Sexton's opinion, most patients who suffer from a concussion have vision problems.

**(24) Joseph Hohmann**

[255] Mr. Hohmann is a vocational rehabilitation consultant with over 35 years of experience in that field. He was qualified without objection as an expert in the field of vocational rehabilitation.

[256] Mr. Hohmann was retained to provide an assessment of whether the plaintiff would be able to actively return to the competitive labour force and, if so, at what skill level.

[257] Mr. Hohmann assessed the plaintiff on February 15, 2011 for approximately five hours. He interviewed him, administered the General Aptitude Test Battery (GATB) related to aptitude (but not dexterity) and reviewed the plaintiff's

employment records and various medical reports that were made available to him. All of those reports were tendered in evidence in this proceeding with the exception of that of Dr. Riar, a psychiatrist, dated September 20, 2010. Mr. Hohmann's expert report is dated March 8, 2011.

[258] The plaintiff's GATB scores as found by Mr. Hohmann placed the plaintiff in the low and low-average range of cognitive ability.

[259] Based upon the plaintiff's history, the length of time he has had his symptoms, his difficulties during surgical assists and at the walk in clinic, as well as the opinions of Drs. Anton, Remick and Wilkinson, Mr. Hohmann is of the opinion that the plaintiff is not capable of working competitively. Any employment will be limited to jobs that are of a non-complex, routine nature.

[260] In particular, the plaintiff will have difficulty functioning as a physician at a competitive level. He may be suited to employment in the clerical field, assisting occupations in the support of health services or sales occupations, where the employer accommodates the plaintiff's limitations. The plaintiff is not suited to physically-oriented jobs.

**(25) Tracy Berry**

[261] Ms. Berry is an Occupational Therapist who was qualified without objection as an expert in that field, including in future care and life planning assessment.

[262] Ms. Berry assessed the plaintiff at his Whistler home on January 11, 2011. Her first expert report is dated March 1, 2011. She assessed the plaintiff again on November 11, 2011. Her second expert report is dated December 7, 2011.

[263] During her first assessment of the plaintiff, Ms. Berry administered standardized cognitive screening tests. He scored low on the sustained-attention and divided-attention (multi-tasking) tasks but normal on the complex-sustained, alternating-attention and selective-attention tasks. She testified that she had difficulty keeping the plaintiff on topic. He was "tangential", easily distracted and

appeared fatigued and overwhelmed. She was unable to complete her testing of him.

[264] By the time of her second assessment, the plaintiff had received occupational therapy from Laurie Nelson and counselling from a psychologist. He still appeared to Ms. Berry as easily fatigued and distractible but seemed to be coping better generally.

[265] Ms. Berry provided a cost-of-future-care and life-planning assessment for the plaintiff based upon her assessments of him, her interview of Ms. Roth, her review of the reports of Dr. Wilkinson (neuropsychologist), Dr. Anton, Dr. Kausky, Dr. Remick, Dr. Riar (psychiatrist), Dr. Teal, Dr. Iverson (psychologist) and Ms. Linde (Drs. Wilkinson and Riar did not provide evidence in this proceeding) and consultations with Ms. Nelson and Dr. Chuck Jung (treating psychologist who also did not provide evidence in this proceeding).

**(26) Darren Benning**

[266] Mr. Benning is an economist with expertise in calculating the present values of future losses and expenses. He was qualified without objection to give opinion evidence in that field of expertise.

[267] Mr. Benning prepared three expert reports:

(a) July 23, 2013: Calculating the present value of the future care costs set out in Tracy Berry's reports. Mr. Benning conceded on cross-examination that his childcare calculations assume the plaintiff will need child care assistance until his youngest child reaches 5-6 years old. He assumed this would be until November 4, 2013 (the start of the trial) rather than the commencement of school year in September. To that extent he agreed that his calculations may be overstated.

(b) July 29, 2013: Calculating the plaintiff's past income loss and the present value of his future income loss. Mr. Benning assumed that the

plaintiff would have received no increase in income or future earnings after the Accident. His calculations also include the impact of negative labour market contingencies such as involuntary disability and reduced hours due to part time work. His calculations do not assume voluntary withdrawal from the workforce due to retirement prior to the age of 70.

Mr. Benning also calculated the present value of a future income loss from real estate development and management assuming a loss of either $25,000 or $50,000 per year to age 70.

(c) Sept. 16, 2013: Calculating the present value of increased real estate holdings of an additional $7.0 million in equity by the time the plaintiff reached age 65.

## C. THE CASE FOR THE TRANSIT DEFENDANTS

[268] The following witnesses were called as part of the Transit Defendants' case:

### (1) John Wong

[269] Mr. Wong is an adjuster who has been employed in that capacity by ICBC for the past 23 years. Mr. Wong met the plaintiff on February 12, 2004, in connection with his January 2004 accident.

[270] Mr. Wong authorized repairs to the plaintiff's vehicle. The plaintiff indicated that he was in no rush to have the repairs made but would do so at some time in the future. The plaintiff also told Mr. Wong that he was very concerned about pain and numbness in his hands. The plaintiff expressed concern that, if the numbness persisted, his career might be shortened but stated that he would let his claim "slide" if the numbness resolved.

[271] Mr. Wong advised the plaintiff of his entitlement to temporary total disability benefits but the plaintiff indicated he was not interested in such benefits.

[272] Mr. Wong noted that the plaintiff was not concerned about money issues and that an income loss claim by the plaintiff was not anticipated. Mr. Wong felt it was unlikely that the plaintiff would make an injury claim.

[273] On August 13, 2004, Mr. Wong left a message on the plaintiff's home answering machine advising that if, the plaintiff did not require anything further, the file would be closed.

[274] On January 28, 2005, the plaintiff called Mr. Wong to advise that he had lost his vehicle repair form. ICBC sent him a new form. The plaintiff complained of soreness to his neck but did not mention any problems with his hands.

[275] There is no evidence in ICBC's file that the plaintiff ever applied for accident benefits in connection with the January 2004 accident.

**(2) Leanne Taylor**

[276] Ms. Taylor is an operations manager employed by ICBC. In November 2006 she was working for ICBC as a claims manager.

[277] She testified that, on November 24, 2006, she received a telephone call from the plaintiff. He advised her that he had not yet repaired the damage to his vehicle from the January 2004 accident and now wanted to do so. Her note of the telephone call indicates the plaintiff also advised that he was having problems with his hands, that he had been diagnosed with traumatic carpal tunnel syndrome and that he would like to pursue a claim in respect of that injury.

[278] Ms. Taylor advised the plaintiff that, as the accident occurred more than two years earlier, his claim was statute barred.

[279] On cross-examination, Ms. Taylor agreed that there was nothing in the plaintiff's file to indicate that he had completed or signed an application for insurance benefits in respect of the January 2004 accident. She also agreed that the plaintiff did not indicate what the problems with his hands were or advise of any symptoms.

### (3) Rajinder Gill

[280] Gill testified with the assistance of an interpreter.

[281] Gill came to Canada from India in 1990. After working at various jobs, he was hired by WTL in October 2006, his first job as a bus driver. He received training and started driving a bus on his own shortly before the Accident. On the day of the Accident, Gill was driving a route he had never driven before. It had been snowing all night, it was “freezing” and the road conditions were very slippery - the worst that Gill had experienced while driving a bus. He knew that he was required to take extra care.

[282] Gill pulled into a bus stop located approximately 250 meters from the Intersection. He testified that he saw the Honda pass him as he was stopped. However, on cross-examination, counsel put to him the transcript of his examination for discovery on November 16, 2010. At that time, he had testified that he did not remember whether the Honda passed him while he was at the bus stop. Despite this earlier evidence, Gill maintained that he remembered seeing the plaintiff’s car pass him at the bus stop.

[283] Gill testified that he accelerated from the bus stop “slowly” to 10 to 15 km/h, and that he did not exceed 15 km/h. He knew the road proceeded downhill toward the Intersection. He also knew that he would have to prepare to stop because he could see that the traffic light was red as he was approaching the Intersection. He began to apply his brakes because the Bus was sliding on the road. Despite his examination for discovery evidence that he accelerated up to 18 km/h, which evidence he admitted was true, Gill refused to accept that he could have exceeded 15 km/h because of the road conditions.

[284] Gill testified that he saw the Honda come to a stop at the red traffic light at the Intersection when he was approximately 50 to 60 feet away. The Bus kept moving towards the Intersection.

[285] During cross-examination, Gill testified he was unable to say how far back from the Intersection's stop line the Honda had stopped because the roadway was covered in snow. However, at his examination for discovery, he testified that the Honda had stopped five to six feet behind the stop line.

[286] The traffic light turned green and the Honda began to move forward. Gill released the brakes on the Bus. After the Honda had moved forward approximately 5 to 7 feet it came to a stop because the Snow Plow had slid into the Intersection.

[287] It was suggested to Gill on cross-examination that, if the Honda had stopped 5 to 6 feet from the stop line when the light was red, and had moved only 5 to 7 feet after it turned green before stopping for the Snow Plow, it had only barely entered the Intersection when it stopped. However, Gill was adamant that the Honda "had crossed the posts where the lights are and gone into the Intersection". (I note it is apparent from the photographs of the Intersection that the posts for the traffic lights for eastbound traffic are located across the Intersection on the eastern side of it. It is possible that Gill was referring to posts for the lights for southbound traffic which are located on a triangular median located on the southwest side of the Intersection, but this is not clear).

[288] During cross-examination Gill could not identify the Intersection from photographs that were put to him. The best he could say was that some of the photographs "looked like" the Intersection.

[289] Gill testified that he did not see the Snow Plow until it had entered the Intersection because he was focusing on the Honda. He testified that the Snow Plow did not stop but proceeded through the Intersection and that he saw it for only "two to three seconds".

[290] Gill attempted to stop but the Bus slid and rear-ended the Honda. He testified that the Bus was skidding and that he was nervous. He was "pumping the brakes". At one point during his cross-examination he testified he was not looking at the Honda - later he said that he was.

[291] Gill testified that the impact pushed the Honda forward five to seven feet. The Honda continued through the Intersection after impact and stopped on the other side. He gave no evidence regarding how hard the impact was.

[292] Gill testified that the Bus came to a dead stop after impact and did not move forward. By this time the traffic light had turned amber. Gill waited for the light to turn green before proceeding through the Intersection and stopping in front of the Honda.

[293] The plaintiff came on to the Bus. He prepared the Statement which Gill signed, spoke to WTL on the Bus' radiophone, said he was "OK" and left.

[294] Gill testified that the plaintiff did not appear to him to be confused.

[295] At the close of his cross-examination, Gill admitted he was struggling to recall the events of the Accident and that it is possible he does not remember. In particular he admitted he has no memory of how fast he was travelling and was guessing at the Bus' speed.

[296] Gill was confused and forgetful about a statement he had given to an insurance adjuster two weeks after the Accident. At first, he did not recall giving a statement. Later, he recalled giving it at his home in Surrey British Columbia and that his wife had been the interpreter. The statement was then shown to him. It had been provided by him in Whistler, not at his home in Surrey and a co-worker had been the interpreter, not his wife. He denied that the statement had been read to him before he signed it despite it stating just above his signature: "This statement of 5 pages is being read to me and my co-worker Hardeep Johal is acting as my Punjabi interpreter."

[297] Gill was not a reliable witness. Although he tried to recall the events of seven years ago, he had great difficulty doing so and resorted to filling in the blanks in his memory with facts that he later admitted he did not remember. He repeatedly contradicted himself in respect of the Bus' speed, distance and proximities.

[298] Gill's evidence was of little assistance to the Court.

**(4) Francesca Cole**

[299] Ms. Cole was the triage nurse on duty at WHCC who made a preliminary assessment of the plaintiff when he attended the clinic on the evening of December 4, 2006.

[300] She assessed the plaintiff as "alert and oriented". His vital signs were stable and his level of consciousness was such that she assigned him an Acuity Level of 4 out of 5, Level 1 being assigned to those in the most need of urgent care.

[301] Ms. Cole agreed on cross-examination that, unless a patient has a decreased level of consciousness or is vomiting, urgent treatment for a concussion injury is not required.

[302] Ms. Cole has known the plaintiff since she began working at WHCC in 1995. She described him as a good and enthusiastic emergency room physician with high energy and a love for his job. She confirmed that, until the Accident, the plaintiff worked longer hours relative to the other physicians at WHCC.

**(5) Randy Butts**

[303] Mr. Butts is an experienced estimator employed by ICBC. He inspected the Honda on December 7, 2006. He found cosmetic damage to the rear bumper but no structural or misalignment damage. The total repair cost was $673.10.

**(6) Scott Burley**

[304] On December 4, 2006, Mr. Burley was employed by WTL as an assistant manager. At approximately 9 am he received a call from Gill on the Bus' radio advising of the Accident. The plaintiff also spoke on the radio and informed Mr. Burley that he could be contacted at WHCC.

[305] Mr. Burley attended WHCC and was given a copy of the Statement. He was advised that the plaintiff was not available to speak to him.

[306] Mr. Burley spoke with the plaintiff on the telephone at approximately noon that day. The plaintiff advised him that he had a headache and was not feeling well. Mr. Burley spoke with the plaintiff on the telephone later that day and was advised that the plaintiff was not available to meet with him to discuss the Accident.

### (7) Robin Brown

[307] Mr. Brown is a professional engineer with both Bachelor's and Master's degrees in Engineering. He was qualified without objection as an engineer with expertise to give opinion evidence in accident reconstruction.

[308] Mr. Brown inspected and took measurements of the relevant components of the Bus on December 16, 2006, and of the Honda on January 18, 2007.

[309] Mr. Brown assumed that the orientation of the impact between the Bus and the Honda was straight on.

[310] Mr. Brown found no damage to the bike rack attributable to the Accident. The damage to the Honda was limited to surface scuffing and minor surface gouges on the rear bumper.

[311] He opined that the localized nature of the damage to the Honda bumper was such that impact was likely between the protruding bolt on the Bus' bike rack and the bumper. He therefore assumed that the forces of the impact were point forces and had not been distributed across entirety of the bumper as would have been the case if the impact had been straight bumper to bumper. However, on cross-examination he acknowledged he had been unable to find any evidence of an impact between the bumper and the bolt. He also agreed that the paint missing from the bumper must have been transferred somewhere, but he did not observe any such paint on the bike rack.

[312] Relying on published studies of impacts between vehicles and poles, Mr. Brown opined that the damage to the bumper of the Honda is most consistent with an impact speed change of less than 5 km/h.

[313] On cross-examination Mr. Brown agreed that if the impact had been a distributed impact across the bumper, rather than a localized impact between the protruding bolt and the bumper, the speed change at impact would possibly have been higher than the 5 km/h he estimated.

[314] Mr. Brown was unable to correlate some of the damage to the bumper to the impact he assumed took place.

[315] On questioning by the Court, Mr. Brown agreed that he would expect less damage to the Honda from the same impact forces if it the road surface was icy because the Honda would have accelerated forward much easier than it would have on a dry surface.

[316] I found Mr. Brown to be an objective and helpful witness.

**(8) Donald Pohl**

[317] Mr. Pohl is a mechanical engineer who has expertise in and was qualified to give opinion evidence on accident reconstruction, including low-speed crash testing.

[318] Mr. Pohl attempted to reconstruct the Accident in his Edmonton shop using an exemplar bike rack similar to the one mounted on the front of the Bus, which he affixed to a rigid barrier. He also obtained an exemplar 2004 Honda Accord vehicle together with three used rear bumper assemblies, each comprising a plastic bumper cover, foam impact absorber with a solid plastic insert in the center of the bumper and a metal impact bar.

[319] Mr. Pohl conducted six crash tests during which the exemplar vehicle was pushed by his staff members at various low speeds into the solidly mounted exemplar bike rack. The damage to the exemplar bumpers caused by the impact was then compared to the damage to the Honda depicted in photographs he had been provided.

[320] All of the test impacts were “linear” or longitudinal. Mr. Pohl did not conduct any tests where the impact was at an angle because, in Mr. Pohl’s opinion, the

damage to the Honda's rear bumper was indicative of a predominantly longitudinal force.

[321] Mr. Pohl assumed that:

(a) the bike rack was not damaged in the Accident;

(b) the lowest most protruding point of the bike rack, a bolt in the center of the face plate, (the "protruding bolt") as measured by Mr. Brown, was 54 cm from the ground as mounted on the Bus;

(c) only the bike rack mounting brackets and face plate came into contact with the Honda; and

(d) the bumper assembly of the exemplar vehicle was identical to that of the Honda.

[322] Mr. Pohl was unable to duplicate the bumper scuff marks shown in photographs of the Honda with the protruding bolt 54 cm above the ground so he adjusted the exemplar bike rack such that the protruding bolt was 47 cm above the ground. This resulted in crash test bumper damage at the same approximate height and locations as shown in the photographs of the Honda.

[323] The first three crash tests were conducted at 3.4 km/h, 4.8 km/h and 5.4 km/h, respectively. They resulted in the bottom flange of the exemplar bike rack deforming. Mr. Pohl concluded that the exemplar bike rack was mounted too high. He lowered it such that the protruding bolt was 37 cm above the ground.

[324] The final three crash tests were conducted at 5.6 km/h, 4.5 km/h and 3.1 km/h, respectively. Based upon the damage to the exemplar bumper covers and deformation of the foam impact absorbers from these test impacts, Mr. Pohl concluded that a crash test impact at 3.1 km/h best replicated the damage to the Honda. In other words, Mr. Pohl is of the opinion that the Honda was accelerated forward at a velocity of 3.1 km/h during the Accident.

[325] Mr. Pohl concluded that several marks on the Honda were unrelated to the Accident because he could not replicate them. They had a "feathered" appearance which, in his opinion, is not typical in a rear-end impact.

[326] Mr. Pohl was aware that the trunk of the Honda was found to be misaligned after the Accident. However he did not attempt to replicate that damage because there was no damage to the Honda suggestive of trunk misalignment caused by the Accident and because, in his opinion, such misalignment is inconsistent with a "minor rear-end impact". In his experience "a significant impact is required to produce trunk misalignment".

[327] On cross-examination, Mr. Pohl agreed that none of the marks on the Honda's bumper were consistent with it having been impacted by the protruding bolt and, accordingly, that the protruding bolt probably was under the Honda's bumper at the time of impact and did not contact the Honda.

[328] He also agreed that it is possible there could have been two impacts between the Bus and the Honda and that the marks on the Honda's bumper that he could not replicate were consistent with a double impact. He also agreed that if the Honda was stopped and the Bus was moving it would have taken more energy to stop the Bus than the Honda. He agreed during questioning by the Court that the "feathered" the markings were indeed consistent with an angular force.

[329] Mr. Pohl also agreed that his tests did not take into consideration that the foam impact absorbers in the bumper would be less pliable and less likely to deform in cold weather, although he opined that the foam would be more brittle in colder temperatures.

[330] Mr. Pohl did not examine either the Honda or the actual bike rack that was mounted on the Bus. He agreed on cross-examination that the foam impact absorber in the Honda could have been of a different constitution than the exemplar foam impact absorber.

**(9) Mark Sawa**

[331] Mr. Sawa has both a Bachelor's and Master's degree in Mechanical Engineering and is an expert in accident reconstruction. He was qualified without objection as an expert in that field.

[332] Mr. Sawa conducted what is known as a Monte Carlo Simulation to calculate and predict the probability of the Accident occurring given several variables and ranges of variables. The 18 variables he used are:

(a) the plaintiff's perception response time to the traffic light changing from red to green;

(b) the total distance moved by the plaintiff's vehicle while it accelerated forward in response to the green light and braked in response to the Snow Plow blocking its path;

(c) the rate at which the plaintiff's vehicle accelerated from its stopped position;

(d) the amount of time that the plaintiff's vehicle coasted while the plaintiff moved his foot from the accelerator to the brake pedal;

(e) the deceleration rate for the plaintiff's vehicle braking to a stop in an emergency fashion in response to the Snow Plow;

(f) the maximum speed attained by the plaintiff's vehicle after accelerating for the green light and before braking for the snow plow (calculated);

(g) the time taken by the plaintiff's vehicle to accelerate and decelerate (calculated);

(h) Gill's perception response time to the traffic light changing from red to green;

(i) the initial travel speed of the Bus;

(j) the acceleration rate for the Bus after the traffic light turned green;

(k) the grade of the roadway;

(l) Gill's perception response time to the plaintiff's vehicle stopping in response to the Snow Plow;

(m) the amount of time that Gill took to move his foot from the throttle to the brake pedal;

(n) the amount of time that Gill accelerated (calculated);'

(o) the maximum speed attained by the Bus after accelerating (calculated);

(p) the time lag between when Gill applied the brake pedal and when the air brakes fully engaged the brakes at the wheels;

(q) the distance required for the Bus to avoid the collision (calculated); and

(r) the distance available for the Bus to avoid the impact.

[333] Mr. Sawa ran the Monte Carlo Simulation for 2,000 different permutations and combinations of the foregoing variables using randomly generated values for the variables within their expected ranges.

[334] Assuming the Bus was coasting after the light turned green and an initial gap of 30 feet between the Bus and the Honda when the light turned from red to green, the simulation showed a 93% probability that the Accident would have occurred. Assuming an initial gap of 40 feet, the simulation showed a 28% probability that the Accident would have occurred.

[335] Assuming that the Bus accelerated after the light turned green, the simulation showed a 100% probability of a collision occurring regardless of whether the initial gap was 30 or 40 feet.

[336] Assuming an initial gap of 100 feet, approximately 42% of the iterations resulted in a collision.

[337] If the roadway was more icy than snowy, a collision would have been more likely.

[338] On cross-examination, Mr. Sawa agreed that, if the facts he was asked to assume were shown not to have existed, his simulation approach would be inaccurate. He also agreed that his simulations did not take into account many of scenarios that could have occurred, such as Gill's perception or reaction time being outside of the typical ranges he used. Moreover, he agreed that his calculations were based on Gill's perception time starting when the Honda had come to a full stop and that they would have been entirely different if Gill started to react when the Honda's brake lights came on or when Gill perceived the Snow Plow sliding before it entered the Intersection. Mr. Sawa agreed that Gill would have had an unobstructed view of the Snow Plow well before it entered the Intersection.

[339] Mr. Sawa also admitted during cross-examination that his simulations were not based on a distance from the rear of the Honda of 25 to 30 feet and a Bus speed Bus of 8 or 9 km/h when Gill first applied his brakes despite Mr. Sawa having been asked to assume those facts. He did not do so because his simulation would have shown that the Bus stopped before hitting the Honda. He testified that, since the Bus did collide with the Honda, those assumed facts could not be valid.

**(10) Darrin Richards**

[340] Mr. Richards is a professional engineer with Bachelor's degrees in Mathematics and Mechanical Engineering as well as a Master's of Science degree in Bioengineering. He has expertise in performing biomechanical analyses and calculating the magnitude of forces experienced by vehicle passengers during motor vehicle accidents. He has substantial credentials in those areas. He was qualified by the defendants as an expert in the field of biomechanics.

[341] According to Mr. Richards, biomechanics is the application of mechanical engineering principles to the human body. It studies the loading that results when a human body is subjected to acceleration forces. The threshold force on a human body above which injury occurs is drawn from scientific studies published in peer-reviewed literature.

[342] Mr. Richards opined on the acceleration that the head of a vehicle passenger is subjected to during a rear-end collision. His opinion is based upon a study he contributed to but did not author (T. Welch et al, “An Evaluation of the BioRID II and Hybrid III During Low-and Moderate- Speed Rear Impact”, Society of Automotive Engineers 2010 International World Congress, 12 April 2010, SAE 2010-0101031 (“Welch Study”) together with the results of studies conducted by others.

[343] The Welch Study involved a series of rear-end collisions using crash test dummies (“ATDs”). One of its goals was to compare and contrast the differences between an ATD model developed in the 1970s to evaluate both frontal and rear impacts (“Hybrid III”) and a new ATD developed specifically for low-speed impacts (“BioRID”). It also aimed to quantify motions of and loads on the head of a human body during rear-end collisions. The study did not draw any conclusions regarding brain injury or concussion potential.

[344] The other studies Mr. Richards relied upon are as follows:

(a) L. Zhang, K.H. Yan & A.I. King, “A Proposed Injury Threshold for Mild Traumatic Brain Injury” (April 2004) 126 J. Biomech. Eng. 226:

> The authors calculated from game videos the dynamics created during high-impact collisions involving 24 NFL football players. The authors recreated those dynamics using ATDs and measured the acceleration forces on the ATDs’ heads. Mr. Richards agreed that this study was merely a “small piece of the puzzle” regarding the forces necessary to cause a concussion and agreed that it must be used with caution. Mr. Richards did not accept that professional football players were not representative of the general population. In his words, “there is no evidence that the brains of football players are any different than normal people”. He did accept that the necks of football players are generally stronger than those of the general population.

(b) W.E. McConnell et al, “Analysis of Human Test Subject Kinematic Responses to Low Velocity Rear End Impacts” (Warrendale, PA: Society of Automotive Engineers, Vehicle and Occupant Kinematics: Simulation and Modeling, 1994), SAE 930889:

> The authors examined rear-end impacts using 4 volunteers. The study was focused on neck injuries, not concussions. There is no evidence that the volunteers were examined by a physician after the impacts. Mr. Richard acknowledged that the volunteers in this study were all “robustly healthy males” who knew they were about to be involved in a rear-end collision. The study found that injuries can occur from low speed impacts.

(c) V. Goodwin et al, “Vehicle and Occupant Response in Low Speed Car to Barrier Override Impacts” (Warrendale PA: Society of Automotive Engineers, 1999), SAE 1999-01-0442:

> Four volunteers were subjected to 24 impacts while they were aware that the impacts were about to occur. Three of the four volunteers declined to submit to tests when the impacts were increased to 8 km/h. The study examined the impact on both the vehicle occupants and its bumpers. The study focused on neck injuries and did not consider concussions or brain injury potential. However, the study indicated acceleration levels of the same order of magnitude as those found in the Welch Study.

(d) S. Kuppa, *Injury Criteria for Side Impact Dummies* (Washington: National Highway Traffic Safety Administration, National Transportation Biomechanics Research Centre, January 2006):

> The authors studied side-swipe collisions using cadavers and ATDs and developed risk curves of for the possibility of injuries.

(e) E. Pellman et al, “Concussion in Professional Football: Reconstruction of Game Impacts and Injuries” (2003) 53:4 Neurosurgery 799 (“Pellman 2003”):

> The authors studied professional football players who had sustained concussions and high-speed impacts on the field. No low-speed impacts were studied, although concussion were suffered by two players at head accelerations of 48 g and 52 g,

respectively. The study found a high correlation between head acceleration and concussive injury but did not study the underlying cause of concussion.

(f) J. Funk et al, “Biomechanical Risk Estimates for Mild Traumatic Brain Injury” [2007] Association for the Advancement of Automotive Medicine 51st Annual Proceedings 343:

> Sensors were installed in the helmets of 64 young, healthy football players. Head acceleration of less than 10 g did not trigger the sensors.

(g) S.S. Margulies & L.E. Thibault , “A Proposed Tolerance Criterion for Diffuse Axonal Injury” (1992) 25:8 Man. J. Biomech. 917:

> The authors studied the kinematics of diffuse axonal injury in primates and scaled the results to humans.

(h) S. Rowson et al, “Linear and Angular Head Acceleration Measurements in Collegiate Football” (2009) 131 J. Biomech. Eng. 1:

> Sensors were installed in the helmets of 10 offensive and defensive football linemen with an average weight of 292 lbs. Mr. Richards agreed that, generally, these players would have been expecting the impacts to occur.

(i) M.E. Allen et al, “Acceleration Pertubations of Daily Living -- A Comparison to ‘Whiplash’” (1994) 19 Spine 1285:

> The authors measured repeated, non-injurious human head accelerations during daily activities.

(j) W. Bussone et al, “Everyday Head Accelerations of a Pediatric Population” (2009) 2:1 SAE Int. J. Passeng. Cars - Mech. Syst. 565:

> The authors documented the non-injurious head accelerations of 12 children performing a series of playground activities. Mr. Richards contributed to this study.

(k) V. Vijayakumar et al, “Head Kinematics and Upper Neck Loading During Simulated low-Speed Rear-End Collisions: A Comparison with Vigorous

Activities of Daily Living" (Society of Automotive Engineers 2006 International World Congress, Warrendale PA), SAE 2006-01-0247:

> The authors compared low-speed rear-end collisions in bumper cars with vigorous daily activities in which concussive injuries were not expected. Participants were healthy and were screened to ensure they had no physical issues.

(l) D.F. Meaney & D.H. Smith, "Biomechanics of Concussion" (2011) 30 Clin. Sports Med. 19:

> The authors reviewed and summarized the existing literature.

(m) R.S. Naunheim et al, "Comparison of Impact Data in Hockey, Football and Soccer" (2000) 48:5 J. Trauma 938:

> The authors studied accelerational forces to the head in high school level football (2 participants), hockey (1 participant) and elite soccer players. No concussions were reported.

[345] Mr. Richards acknowledged that the football players who participated in the above studies may well have had a tendency to underreport concussion symptoms for fear of being sidelined.

[346] Mr. Richards also acknowledged that no scientific study has yet been performed of rear-end collisions where human beings sustained concussions.

[347] Mr. Richards is unaware of any instance during these studies of a 5 km/h rear-end impact causing a concussion. The lowest head acceleration that resulted in a concussion was 48 g (Pellman, 2003).

[348] Mr. Richards agreed on cross-examination that it is difficult to determine the severity of a rear-end collision injury from vehicle damage alone. He also agreed that a full understanding of the biomechanical causes of concussion has yet to be achieved and that there is more to learn and more work to be done.

[349] Mr. Richards recognizes that there are no absolutes or certainties when it comes to the human body. The studies he relies upon merely analyze the risk of a

concussion occurring at various head accelerations. He agreed that, for genetic or other reasons, some people are more prone to concussions than others and that there is a "spectrum of tolerances" in the human body. The level of injury can vary greatly from person to person. Injury thresholds in humans are not a black and white science.

[350] In summary, Mr. Richard's opinion is that the magnitude of the acceleration forces during the Accident, as calculated by Mr. Brown, were less than those that scientific studies to date have shown are likely to result in a concussive injury. However, his opinion is that, although these studies have shown that there is a low risk of concussion injury with an impact speed of less than 5 km/h, he cannot rule out or exclude the possibility that a concussion injury will occur.

[351] Mr. Richards was an impressive expert witness whose opinions I accept.

**(11) Dr. Hedi Oetter**

[352] Dr. Oetter is the Registrar and Chief Executive Officer of the College of Physicians and Surgeons of British Columbia.

[353] She testified there is a mandatory requirement for medical doctors who are disabled due to injury to report to the College only if their continued practice is a danger to the public. Physicians may designate themselves temporarily inactive

[354] To be reinstated, the treating physician must confirm that it is safe for the registrant to return to practice.

[355] She testified the plaintiff has neither reported to the College that he is disabled nor designated himself to be temporarily inactive.

[356] Physicians in British Columbia are expected to engage in meaningful continued professional development on an annual basis.

**(12) Dr. John Corey**

[357] Dr. Corey is the owner and managing director of the Park Royal Medical Clinic, the walk-in clinic at which the plaintiff worked several shifts in 2008 and 2009.

[358] Dr. Corey testified that he received no complaints from either patients or staff regarding the plaintiff. The plaintiff did not sound confused during the telephone conversations Dr. Corey had with him regarding the scheduling of his shifts.

**(13) Dr. Derryck Smith**

[359] Dr. Smith is a psychiatrist who was qualified to give opinion evidence in that capacity. He conducted an assessment of the plaintiff on December 1, 2010. His medical/legal report is dated March 1, 2011.

[360] It is Dr. Smith's opinion that:

(a) the plaintiff's reported symptoms are "well out of keeping with the description of the accident";

(b) the plaintiff did not suffer a traumatic brain injury;

(c) the plaintiff has recovered from his symptoms of anxiety and depression;

(d) the plaintiff continues to have a sleep disturbance for unknown reasons; and

(e) if the plaintiff continues to suffer from a cognitive disorder, it is likely related to pain and/or a sleep disorder, not a traumatic brain injury.

[361] Dr. Smith's further opinion is that the plaintiff's failure to return to work as an emergency room physician is not related to psychiatric illness or the sequelae of traumatic brain injury. He recommended that the plaintiff undergo neuropsychological testing because such testing uses validity measures to determine whether the subject is being forthright.

[362] In Dr. Smith's opinion, any diagnosis of post-concussion syndrome is invalid because the syndrome "does not exist".

[363] Dr. Smith was cross-examined at length. He was argumentative throughout.

[364] Dr. Smith testified that he is very reluctant to accept a diagnosis of concussion at the lower end of the diagnostic criteria spectrum because the symptoms are usually too vague and non-specific. However, it was pointed out to him that he had been quick to opine in his report that the plaintiff "may have sustained a concussion" during his earlier January 2004 accident solely on the basis of his having read that the plaintiff had hit his head during the accident despite the plaintiff having advised him to the contrary.

[365] Dr. Smith agreed that emergency room records are important to the formation of his opinions yet he gave no weight to the diagnoses of concussion by the WHCC emergency room physicians and Dr. Teal. He justified the lack of weight based on, first, his uncertainty whether WHCC was "an emergency room" and, second, his view that the diagnosis of concussion "is thrown around pretty casually". Instead, he looked for objective evidence of impairment consistent with concussion and concluded there was none.

[366] Dr. Smith also agreed it is important to consider the plaintiff's before-and-after-Accident histories as described by his family and friends, yet he did not obtain any such information.

[367] Dr. Smith stated there was no evidence the plaintiff had suffered immediate cognitive impairment after the Accident. It was suggested to him that there was ample evidence of cognitive impairment. Dr. Smith agreed that memory gaps (the plaintiff could not remember preparing the Statement or driving to WHCC), confusion, decreased concentration, problems with multi-tasking, fogginess, irritability and nausea following the Accident were reported to him and are consistent with a concussive injury, yet he ignored all of those reported symptoms when formulating his opinion.

[368] Dr. Smith agreed that if the plaintiff slept well before the Accident, his current sleep disorder is likely due to the Accident. He also accepted that it is possible any cognitive impairment is the result of the Accident.

[369] Dr. Smith ultimately agreed that if the plaintiff functioned at a high level and had his symptoms after but not before the Accident, then it is likely that the symptoms were caused by the Accident. He agreed that evidence the plaintiff has shown signs of improvement in his cognitive functioning since the Accident is consistent with him having sustained a concussion.

[370] Dr. Smith also agreed that 10 - 15% of people who suffer a MTBI have permanent problems, including an inability to work and function in daily activities.

[371] Eventually, after extensive cross-examination, Dr. Smith agreed that the plaintiff may have sustained a concussion in the Accident.

### (14) Dr. Alister Prout

[372] Dr. Prout is a neurologist who was qualified without objection to give opinion evidence in that specialty.

[373] Dr. Prout met with and conducted a neurological examination of the plaintiff on February 3, 2010. His medical legal report is dated February 7, 2011.

[374] His neurological testing of the plaintiff revealed him to be within normal ranges. He agreed on cross-examination that the neurological examinations of most concussion victims are normal.

[375] In Dr. Prout's opinion, the plaintiff's ongoing reported concerns are out of keeping with the nature of the injuries he sustained during the Accident.

[376] Dr. Prout was of the opinion that it is unlikely the plaintiff suffered a concussion injury during the Accident. He based this opinion on the Accident having been a relatively low-velocity impact. He also relied on his understanding that the plaintiff had only a very brief loss of awareness and was able to interact with Gill in a

very short period of time after the impact without appearing to be confused. Given this understanding of the Accident, Dr. Prout testified that he has difficulty explaining the plaintiff's ongoing difficulties.

[377] In Dr. Prout's opinion, the majority of symptoms reported by the plaintiff following the Accident can be explained as a combination of an emotional reaction to the Accident, pain, sleep disturbance and the development of some psychological difficulties. Dr. Prout opined that the plaintiff should undergo neuropsychological testing to separate and identify any neurological issues from any psychological issues.

[378] He opined that the plaintiff does not have neurologic deficits or residual effects of a neurological injury caused by the Accident that would result in an inability to return to at least part-time work in emergency or clinical medicine.

[379] On cross-examination, Dr. Prout conceded that he does not diagnose a concussion injury if it is merely probable. Rather he will only diagnose a concussion if he is almost certain that a patient has sustained a concussion.

[380] Dr. Prout agreed on cross-examination that if the plaintiff had more than a brief period of loss of awareness and memory and was disoriented more than the amount that Dr. Prout identified, then the probability that the plaintiff suffered a concussion increases.

[381] He also agreed that he would defer to the opinion of a psychiatrist with neuropsychology training who found no psychiatric or psychological pathology. He agreed that if no psychiatric or psychological pathologies were found, it is likely that the plaintiff's symptoms are due to a concussion.

[382] Dr. Prout knows and respects Dr. Teal.

[383] Dr. Prout agreed that, when diagnosing a concussion, it is helpful to obtain histories from others comparing the patient prior to and after the accident. Dr. Prout was not provided with any such information. He agreed that a patient being

observed as disoriented and confused after an accident would be weighty evidence of a concussion. Dr. Prout conceded his understanding that the plaintiff appeared to Gill to be functioning and behaving normally after the Accident was of critical importance to his opinion.

[384] Dr. Prout agreed on cross-examination that little is known about why some people are more susceptible to a concussion injury than are others, but opined, based on the usual clinical parameters that if the plaintiff suffered a concussion his prognosis for a full recovery from it would have been very good. However, he also agreed that ten percent of concussion victims do not fully recover and have permanent problems.

[385] Dr. Prout agreed that the plaintiff could have had mild disorientation and a mild gap in his memory and therefore could have sustained a concussion and could fall into the 10% of people who do not recover from a concussion injury.

[386] Dr. Prout agreed that many of the plaintiff's symptoms are consistent with a concussion injury having been sustained, specifically vomiting early on, ongoing headaches, dizziness, nausea, vision problems, physical and mental fatigue, excessive sleep, confusion, sensitivity to noise and light, irritability, depression and anxiety symptoms and problems with memory, concentration, multi-tasking, speech and communication. He also agreed that any one or more of them would meet widely accepted diagnostic criterion for concussion. He further agreed that, with a concussion, he would expect at least some of the symptoms to improve or resolve, while they would be expected to increase rather than improve if they were psychological.

[387] Dr. Prout agreed on cross-examination that if the plaintiff had some disorientation and confusion and some gap in his memory and the above symptoms without any other explanation for them, the best explanation is that the plaintiff probably had a concussion.

[388] Dr. Prout agreed that post-concussion syndrome is a valid and generally recognized medical diagnosis and that the plaintiff's reported symptoms are consistent with that syndrome.

[389] He agreed that the vast majority of those suffering from carpal tunnel syndrome fully recover with the use of a brace. Of those that do not, approximately 95% fully recover with surgery.

[390] Dr. Prout was an impressive witness who gave his evidence in an objective, candid and helpful fashion.

**(15) Lisa Marginson**

[391] Ms. Marginson is a rehabilitation consultant. She was retained by the plaintiff's disability insurer, Sun Life, in early 2009 to obtain information from the plaintiff regarding his functioning, treatment and return to work potential and plan at that time.

[392] Ms. Marginson interviewed the plaintiff in West Vancouver on March 12, 2009. She found that the plaintiff answered her questions and shared information openly. She did not observe any "major" issues with his memory or concentration.

[393] Ms. Marginson noted that the plaintiff did not have a clear recollection of the Accident, but reported headaches, nausea and difficulty following what was being taught at the intubation course shortly thereafter.

[394] Afterwards, the plaintiff became angry he was not being permitted to return to work.

[395] Ms. Marginson concluded that that plaintiff was very dedicated to being an emergency room physician where he believed he had thrived. The plaintiff was not prepared to consider any plan other than one that involved returning to that profession. He was defensive about any suggestion that his cognitive abilities may limit his ability to do so.

### (16) Mark Gosling

[396] Mr. Gosling is an economist. He was qualified without objection to give economic opinion evidence.

[397] Mr. Gosling provided a report in which he commented on Mr. Benning's future income loss multipliers and provided alternative multipliers for use by the Court.

[398] Mr. Gosling's actuarial multipliers were virtually identical to those of Mr. Benning (12.637 to age 70 on January 8, 2030 vs. 12.637 to December 31, 2029).

[399] Mr. Gosling's economic multipliers (assuming non-participation in the Labour Force due to both voluntary withdrawal and disability) were slightly different than those provided by Mr. Benning (10.292 to age 70 on January 8, 2030 vs. 11.770 to December 31, 2029).

## D. THE CASE FOR ICBC

[400] ICBC did not call any witnesses. It adopts the evidence led by the Transit Defendants.

## E. THE PLAINTIFF'S REBUTTAL EVIDENCE

### (1) Donald Rempel

[401] Mr. Rempel is a mechanical engineer with expertise in forensic engineering and motor vehicle accident reconstruction. He was qualified without objection as an expert to give opinion evidence in that field.

[402] Mr. Rempel reviewed and opined on the opinion evidence of the defendants' engineering experts, Mssrs. Sawa, Brown and Pohl.

[403] Mr. Rempel dismissed Mr. Sawa's Monte Carlo simulation because it assumes that Gill would have had no regard for his speed or the distance between the Bus and the Honda and would not have perceived the Honda to be a hazard until the Honda had come to a complete stop as a result of the Snow Plow entering the

intersection. In Mr. Rempel's opinion, such modeling has no connection to the reality of normal driving where drivers consider the "closing circumstances" as they approach other vehicles.

[404] Mr. Rempel disagreed with Mr. Pohl's opinion that the "feathered" markings on the Honda bumper are unrelated to the Accident. Mr. Rempel pointed out that Mr. Pohl's crash tests had been conducted on a dry surface with a perfectly stable Honda reversing into a fixed and perfectly stable bike rack. There was no consideration of the real-world circumstances of a likely rough roadway or the braking action of the Bus. In Mr. Rempel's opinion, the markings on the Honda bumper are precisely those that would be expected to result from a collision between the Bus' bike rack and the Honda on an icy, winter road surface with a braking Bus.

[405] Mr. Rempel opined that a low-speed collision between the Bus and the Honda could be expected to result in more than one impact in rapid succession.

## F. ANALYSIS

[406] Over the course of this 29 day trial, I had the benefit of hearing 27 lay witnesses and 16 expert witnesses. My analysis is based upon a considered assessment of their credibility and reliability as witnesses and the evidence they proffered.

### (1) Liability

[407] The Transit Defendants admit that Gill was operating the Bus at the time of the Accident, that the Bus was owned by BCT and leased to WTL, that both BCT and WTL were "owners" of the Bus pursuant to the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 and that Gill was operating the Bus with the express or implied consent of both BCT and WTL. Each is an "owner" of the Bus pursuant to the provisions of the *Motor Vehicle Act*.

[408] ICBC admits that:

i. on December 4, 2006, the Transit Defendants notified ICBC of the existence of the Snow Plow sliding into the intersection;

ii. on December 19, 2006, the plaintiff advised ICBC that a snow plow had been involved in the Accident; and

iii. on February 8, 2007, the plaintiff published an advertisement in the Whistler Question newspaper seeking witnesses to the Accident.

#### (a) Was Gill Negligent?

[409] When one vehicle rear ends another, the onus is on the rear-ending vehicle to demonstrate the absence of negligence: *Robbie v. King*, 2003 BCSC 1553, at para. 13; *Cannon v. Clouda*, 2002 BCPC 26 at para. 9; *Cue v. Breitkreuz*, 2010 BCSC 617 at para. 15; *Stanikzai v. Bola*, 2012 BCSC 846 at para. 7.

[410] This is because the following driver owes a duty to drive at a distance from the leading vehicle that allows reasonably for the speed, the traffic and the road conditions: *Barrie v. Marshall*, 2010 BCSC 981, at paras. 23-24; *Rai v. Fowler*, 2007 BCSC 1678, at para. 29. This duty is codified in ss. 144 and 162 of the *Motor Vehicle Act.*

[411] Driving with due care and attention assumes being on the lookout for the unexpected: *Power v. White*, 2010 BCSC 1084 at para. 28, aff'd 2012 BCCA 197.

[412] The Transit Defendants argue that Gill was not negligent because the Accident was unavoidable. They rely upon the opinion evidence of Mr. Sawa.

[413] I have several concerns with Mr. Sawa's opinion. First, it relies upon accelerations, speeds, distances, proximities, perception speeds and a host of other scenarios and variables that are either not in evidence or are based upon the evidence of Gill, which I have found to be unreliable. Second, it does not consider the scenario of a collision if the initial gap between the Bus and the Honda was other than 30, 40 or 100 feet. Instead, Mr. Sawa invited the Court to use averages and linear relationships that would "appear" to provide an accurate result for those other

distances. Third, it is based upon variables that the Court is required to speculate about. For example, if the plaintiff's perception response time was 1.2 seconds and the plaintiff's vehicle moved forward five feet at 5 km/h, then there is nothing in Mr. Sawa's analysis that can be consulted to determine the likelihood of the collision. Fourth, and most glaringly, it completely disregards the approach circumstances that a normal driver would realistically react to.

[414] I agree with Mr. Rempel's criticisms of the Sawa report.

[415] I also agree with the sentiments of Mr. Justice Wilson of the Alberta Court of Queen's Bench in *Mulchandani v. Kooistra Trucking Ltd.* 2006 ABQB 391 who stated the following regarding a similar report from Mr. Sawa, at para. 30:

> This is one of the reasons that I give no credit to the report of Sawa or his opinions. As will be seen from his report, he puts a position that if a number of conditions had been fulfilled, the accident would not have happened, or the damage would have been less severe. That is not how a case like this must be decided. Unstated in his opinion, but equally in the realm of "what ifs" is the case that if the Defendant had parked his truck that day and not proceeded, the accident would not have happened. This sort of expertise [is] unhelpful.

[416] The defendants' use of the Sawa report to argue that the collision was inevitable is, effectively, an attempt to support a conclusion that Gill met the required standard of care. The Court is capable of forming its own conclusions regarding whether or not Gill met the standard of care expected of him in the circumstances while he was driving the Bus toward the plaintiff's stopped vehicle. In such circumstances, the opinion of an expert is unnecessary: *R. v. Mohan* [1994] S.C.R. 9 at 27.

[417] This was a rear-end collision. The road surface was icy. When the light turned green, the plaintiff started to proceed into the Intersection. He stopped because of the presence of the Snow Plow. He was able to do so safely despite the slippery conditions. Gill testified he did not even see the Snow Plow until it was in the Intersection. The photographic evidence satisfies me that it is inconceivable the Snow Plow would not have been seen by an attentive driver well before it entered

the Intersection. Gill had a clear line of sight. He had a duty to be on the lookout for unexpected maneuvers by other vehicles on the road, for example, the Snow Plow sliding into the intersection, or the Honda coming to an abrupt stop.

[418] The Accident did not take place because it was inevitable. It took place because Gill was not properly attentive or because the Bus was travelling too fast for the road conditions, or because Gill was not sufficiently competent to drive the Bus in the road conditions he faced. There is no evidence that the road conditions were any more slippery than would normally be expected on a snowy winter day in Whistler. Gill's conduct did not meet the standard of care expected of him in the circumstances.

[419] The Accident was caused by the negligence of Gill. BCT and WTL are vicariously liable for his negligence.

**(b) Was the Snow Plow Driver negligent?**

[420] The plaintiff and the Transit Defendants argue that the Accident was contributed to by the driver of the Snow Plow.

[421] Section 144 of the *Motor Vehicle Act* provides that a person must not drive a motor vehicle on a highway without due care and attention or at a speed that is excessive relative to road or weather conditions.

[422] A *prima facie* case of negligence is established where it is shown that the defendant had control of the vehicle and the event would not have occurred with the exercise of proper care: *Michel v. John Doe*, 2009 BCCA 225 at para. 22.

[423] Although December 4, 2006, was a snowy and icy winter day in Whistler, there is no evidence that the plaintiff had any difficulty controlling the Honda prior to the Accident. The road conditions should not have taken any driver by surprise.

[424] The evidence is that the Snow Plow slid into the Intersection after the traffic light had turned yellow or red in its direction.

[425] The applicable section of the *Motor Vehicle Act* is as follows:

> **Yellow light**
>
> 128 (1) When a yellow light alone is exhibited at an intersection by a traffic control signal, following the exhibition of a green light,
>
> (a) the driver of a vehicle approaching the intersection and facing the yellow light must cause it to stop before entering the marked crosswalk on the near side of the intersection, or if there is no marked crosswalk, before entering the intersection, unless the stop cannot be made in safety.

[426] Drivers approaching an intersection exhibiting a yellow traffic light must cause the vehicle to stop unless the stop cannot be made in safety. No evidence was led to suggest that the Snow Plow could not have stopped in safety had its driver been operating it at a standard of care commensurate with the road conditions. An inference of negligent driving will be made in the absence of such evidence.

[427] Accordingly, I find that the driver of the Snow Plow, John Doe, was also negligent in causing the Snow Plow to slide into the Intersection. The defendant Jack Doe Company Ltd. is vicariously liable for the negligence of John Doe.

### (c) *Insurance (Vehicle) Act*, Section 24(5)

[428] ICBC's liability is subject to the provisions of sections 24(5) and 105 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231.

[429] Section 24(5) of the *Insurance (Vehicle) Act* provides as follows:

> (5) In an action against the corporation as nominal defendant, a judgment against the corporation must not be given unless the Court is satisfied that
>
> > (a) all reasonable efforts have been made by the parties to ascertain the identity of the unknown owner and driver or unknown driver, as the case may be, and
> >
> > (b) the identity of those persons or that person, as the case may be, is not ascertainable.

[430] The plaintiff did nothing other than arrange for the placement of a small advertisement in the Whistler newspaper that requested witnesses to the Accident to come forward. The words "snow plow" did not appear in the advertisement.

[431] Counsel for the plaintiff submitted that, because s. 24(5) reads "…all reasonable efforts have been made by the parties…", ICBC was a party and was required to make all reasonable efforts to identify the unknown driver of the Snow Plow. He suggests that ICBC was in a vastly superior position over the plaintiff to do so.

[432] I disagree. The plaintiff is the party seeking judgment against ICBC and has the burden of satisfying the Court that the requirements of s. 24(5) have been met.

[433] The test of reasonableness is subjective in the sense that the plaintiff must have been in a position and condition to obtain the appropriate information: *Leggett v. Insurance Corp. of British Columbia*, (1992) 72 B.C.L.R. (2d) 201 (C.A.) at 206. The standard required of the plaintiff is not perfection: *Pearce v. Insurance Corp. of British Columbia* (1999), 6 C.C.L.I. (3d) 274, 1998 CarswellBC 1039 (B.C.S.C.) at para. 26; *Nicholls v. Emil Anderson Maintenance Co.*, 2010 BCSC 1640 at para 6,, aff'd 2011 BCCA 422. Reasonableness is to be decided on the basis of all the circumstances of the case: *Holloway v. I.C.B.C. and Richmond Cabs and John Doe,* 2007 BCCA 175 at para. 12.

[434] The evidence is that the Snow Plow was a large "highway" snow plow. In my view, "all reasonable efforts" would have included contacting the known or easily identifiable highway snow plow operators and contractors in an attempt to determine which drivers were operating snow plows on the morning of the Accident and in what location. Those enquiries were well within the resources of the plaintiff and/or his counsel. No such steps were taken. Indeed, no effort whatsoever was made to ascertain the identity of the driver of the Snow Plow. The plaintiff did not provide an explanation for his failure to do so.

[435] In my view, to the extent that the plaintiff's injuries were caused or contributed to by the negligence of the driver of the Snow Plow, judgment in respect of those injuries against ICBC is precluded by section 24(5) of the *Insurance (Vehicle) Act.*

[436] Given this ruling, there is no need to deal with the limit of liability found in section 105 of the *Insurance (Vehicle) Act.*

[437] The defendants, excluding ICBC, are jointly and severally liable for the plaintiff's injuries.

**(2) Causation**

[438] The plaintiff must show on the balance of probabilities that he was injured by and his injury would not have occurred but for the defendants' negligence. The "but for" test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendants' negligence made to the injury: *Clements v. Clements* [2012] 2 SCR 181 at paras 8-9.

[439] Causation is to be decided on the whole of the evidence: *Hoy v. Harvey*, 2012 BCSC 1076. Here, as in many personal injury cases, the evidence of injury consists of the subjective history of the plaintiff, the collateral evidence of his wife, friends and former co-workers, as well as the findings and opinions of several medical and engineering experts.

[440] The defendants contend that the plaintiff is a malingerer and that his failure to return to work after the Accident was part of a conscientious plot, contrived at the time of the Accident, to transform his life from that of a workaholic to that of a malingerer. Their theory is that the plaintiff had become burnt out, was exhausted by his new parenting role, was angry at ICBC for denying his earlier claim and the Accident was an opportunity to not only change his life but also to obtain retribution against ICBC.

[441] The defendants say the damage to the Bus and to the plaintiff's vehicle was so minor that the plaintiff could not possibly have suffered the injuries he complains of. They sought to bolster their position with engineering evidence they submit demonstrates that the forces created by the collision and transmitted to the plaintiff's body were minimal at best. Alternatively, they argue that any injury the plaintiff suffered has either been exaggerated or is not attributable to the Accident.

[442] Gill gave evidence that the Bus hit the Honda with sufficient force to push it 5 to 7 feet forward into the Intersection, albeit on a slippery roadway. He gave no evidence regarding whether the contact between the Bus and the Honda was straight on or at an angle. He gave no evidence regarding the force of the impact. If the Bus merely “tapped” the Honda, I am confident I would have heard evidence from Gill to that effect.

[443] The only evidence regarding the magnitude of the impact between the Honda and the Bus was opinion evidence of Mssrs. Brown, Pohl and Rempel.

[444] Mr. Brown assumed the impact had been straight on point impact between the bike rack’s protruding bolt and the Honda’s bumper. However, he found no evidence of such an impact. He agreed that if the impact had not been focused but rather distributed, the forces would have been higher than those he had calculated.

[445] Mr. Pohl was able to produce damage to an exemplar vehicle that he concluded was similar to some of the damage depicted in photographs of the Honda at an impact speed of 3.1 km/h. He therefore opined that the speed of the impact during the Accident was approximately 3.1 km/h. He was unable to reproduce other obvious damage so he concluded it was unrelated to the Accident.

[446] The difficulties I have with Mr. Pohl’s crash tests are that:

(a) all were single direct impacts between the bike rack and the vehicle whereas some of the damage to the Honda is consistent with a double angular impact;

(b) they did not take into consideration that the foam impact absorber in the bumper likely reacts differently in colder weather; and

(c) they did not replicate the actual damage to the Honda.

[447] According to Dr. Anton, who I found to be an impressive and credible expert witness, there is no authoritative medical literature setting out the threshold of force required to produce a brain injury in a vehicle passenger. However, there is a

relationship between the forces occurring in a motor vehicle accident and the likelihood of injury, albeit far from a one-to-one relationship. He opined that, although it is useful to know something about the mechanics of a collision, those mechanics do little to assist the medical diagnosis. Accident reconstruction discloses nothing about an individual's vulnerability to the forces. The forces that can cause a brain injury are either (a) direct (a linear force causing a blow to the head with injury at the site of the blow or, if the brain moves, at the other side of the skull) or (b) diffuse (rotational causing traction and stretching of the long nerve fibres resulting in brain injury at locations other than where the direct trauma occurred).

[448] Mr. Richards agreed. Although he was of the opinion that the risk of a concussion injury during a low-impact collision is small, much more scientific study is required regarding whether a particular person will be vulnerable to concussion.

[449] Dr. Smith's view was that the Accident was a minor impact, there was no objective evidence of a concussion and it was therefore "preposterous" to suggest that the plaintiff sustained a concussive injury. However, Dr. Smith did not attribute the plaintiff's subjectively reported symptoms to any other cause. He ignored and made no attempt to reconcile the contrary opinions of other respected physicians and the diagnostic criteria for concussions set out in authoritative text books he had previously endorsed because they "set the bar way too low". He relied only upon information that was supportive of his opinions and disregarded the information that was not. He sought to justify his approach by stating: "These are the facts and assumptions that I relied upon in forming my opinion. Obviously I did not rely upon [the other information I was given] because it's not reflected in my facts and assumptions". This kind of "cherry-picking" by experts is unhelpful. Dr. Smith was not an objective expert witness. I do not accept his opinion that the plaintiff did not suffer a concussion in the Accident.

[450] According to the authoritative definitions commonly used by physicians to diagnose concussions, the plaintiff sustained a MTBI. The defendants do not suggest otherwise. Instead, they merely submit that because the plaintiff's

complaints are subjective and that he complains he suffers from virtually all of the symptomatic criteria when only two or three would suffice, he “doth protest too much” and must have fabricated his evidence.

[451] Although the medical opinions at trial were based largely upon the plaintiff’s subjective descriptions of his symptoms, the fact that the plaintiff’s symptoms are subjective does not mean they are not real.

[452] To accept the defendants’ submissions that the plaintiff is a malingerer and that the forces imparted on the plaintiff by the Accident could not have injured him, I would have to completely disregard the evidence of the plaintiff, Ms. Roth and all other lay witnesses called by the plaintiff (several of whom are physicians) who testified about the plaintiff’s sudden and dramatic change in character and personality in the hours, days, months and years following the Accident. I found each to be candid, credible, forthright and, above all, honest. The defendants’ theory of the case is devoid of credulity and appears to have been inspired by nothing more than a conviction that the Accident impact was minor and could not possibly have injured anyone.

[453] I accept that the Accident was relatively minor in terms of the physical damage sustained by the Honda and the Bus. However, even a low-impact collision can cause injury: *Lubick v. Mei*, 2008 BCSC 555 at para. 5.

[454] The evidence in this case establishes that the low-velocity impact was sufficient to move the plaintiff’s vehicle forward from a complete stop to the middle of the intersection, albeit in slippery road conditions. The plaintiff saw a “white light” immediately after impact.

[455] The evidence is overwhelming and uncontradicted that, prior to the Accident, the plaintiff had a long history of functioning at a high level. He had extraordinary energy, was exceptionally hard working and successful. He loved people, was well liked and had a very good reputation in the community.

[456] The evidence is equally overwhelming and uncontradicted that, immediately after the Accident, the plaintiff was confused, disoriented, had gaps in his memory and was lethargic. In the days and weeks that followed it was plain to those who knew him that he no longer had many of his pre-Accident qualities. He has cognitive and communication difficulties, low energy, is unable to work effectively or efficiently, and is forgetful, withdrawn and irritable. He has had episodes of anxiety and depression.

[457] A small yet cogent example of the plaintiff's cognitive issues was seen during his cross-examination when he was asked about his and Ms. Roth's ages at the time his children were born. It was obvious that he was stumbling and was confused. He appeared lost. He was wrong in their ages by five years. There were many other instances where the plaintiff became easily confused over relatively simple matters. Examples include the cross-examinations of him regarding Dr. Lisa Marginson's report dated March 12, 2009, his personal training program, his income tax returns and his receipt of Canada Pension Plan Disability Benefits. It was obvious that he had difficulty distinguishing between actual and planned achievements.

[458] While there are some inconsistencies in the various descriptions given by the plaintiff to medical practitioners regarding his recollection of the Accident, I find that those inconsistencies reflect the day-to-day variability of plaintiff's symptoms, his genuine struggles to remember and his legitimate attempts to piece together as best he could what actually had happened and to come up with an explanation for his injuries. I accept that he has a difficult time distinguishing between what he thinks must have happened and what he can actually remember happening.

[459] It is obvious to me that the plaintiff continues to be confused about the details of the Accident. It is equally obvious to me that this confusion is the result of the plaintiff's Accident-related injuries, not an attempt to fabricate a condition that does not exist.

[460] I find that the plaintiff's symptoms, as he described them, are genuine.

[461] It is the opinion of each of Drs. Kausky, Teal, Anton and Remick, all impressive experts whose respective opinions I accept, that the plaintiff suffered a MTBI and, thereafter, post-concussion syndrome as a result of the Accident.

[462] Dr. Prout, who I found to be a candid and objective expert, did not diagnose a concussion at the time of his Report because he understood the plaintiff had been able to remember details of the Accident, he appeared to Gill to be behaving normally shortly after the Accident and because other possible explanations for the plaintiff's symptoms had not been ruled out.

[463] However, Dr. Prout, agreed that, if the plaintiff was functioning at a high level prior to the Accident, had some confusion, some disorientation, some gaps in his memory and other symptoms associated with a concussion after the Accident without any other explanation for those symptoms, the best explanation is that the plaintiff probably suffered a concussion.

[464] I have placed no reliance on Gill's evidence that the plaintiff did not appear to be confused. Gill's interaction with the plaintiff was fleeting, he had never met the plaintiff previously and he was not shown to be qualified of providing trustworthy substantiation of normal human behaviour. Further, I have found Gill's evidence generally to be confused and unreliable.

[465] Dr. Smith opined that post-concussion syndrome is not a valid medical diagnosis. Drs. Teal and Prout opined that it is not only a valid, but also a generally recognized diagnosis. I accept the opinions of Drs. Teal and Prout and reject those of Dr. Smith.

[466] In my view the plaintiff has established beyond the balance of probabilities that the dramatic and sudden onset of symptoms of headaches, dizziness, nausea, vomiting, physical and mental fatigue, confusion, sensitivity to noise and light, irritability, depression and anxiety and problems with vision, concentration, multi-tasking and speech and communication, are the result of him having suffered a MTBI (concussion) caused by the Accident.

[467] Moreover, I find that the plaintiff continues to suffer from post-concussion syndrome as a direct result of his Accident-related concussion.

### (3) Damages

[468] The plaintiff is entitled to an award of damages that will put him, so far it is possible for money to do so, in the same position he would have been in had the Accident not occurred: *Blackwater v. Plint*, 2005 SCC 58 at para 74, *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 32..

#### *(i) Non-Pecuniary Damages*

[469] The considerations to be taken into account by a court in assessing non-pecuniary damages were set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:

> [46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[470] Prior to the Accident, the plaintiff was a confident, decisive, energetic individual with an excellent memory and a penchant for detail. He was able to identify a problem facing him, define the options available for resolving the problem and choose from among them. He loved challenge and loathed routine. He felt he could accomplish anything he wanted to. He was the hardest-working emergency

room physician at WHCC. He loved and was passionate about his work. He thrived on the stimulation and the trauma of the emergency room. He was happy with his life and enjoyed helping others.

[471] At the time of the Accident, the plaintiff was at the height of his medical career. He had a very good reputation as an emergency room physician and was well respected in the Whistler community. His reputation was important to him and he was proud of his accomplishments. He had no plans to retire.

[472] There is no question that the plaintiff's life has changed profoundly as a result of the Accident. His ability to function in everyday life has been significantly impaired. He has considerable cognitive challenges that will likely affect him for the rest of his life. He has lost his overall confidence. He struggles to make decisions and initiate activities. He is inattentive and displays poor judgment. He has withdrawn socially. His thresholds for mental and physical activities are limited to approximately 2 hours and 30 minutes, respectively, beyond which he becomes symptomatic. He is no longer able to practice as an emergency room physician, a job he was passionate about and proud of. His ability to interact with and enjoy his children has been impaired. The medical experts are of the opinion that his recovery has likely plateaued.

[473] As a result of the Accident, the plaintiff's ability to work in the job he loved has been taken from him. He has lost his sense of purpose in life. He no longer feels that he is a contributing and productive member of society. The realization that he will be unable to return to his profession and that his life as it was prior to the Accident is gone has been devastating to him.

[474] He wanted to engrain in his children the values of hard work and reputation in the community. It is devastating to him that he cannot show his children that he works hard.

[475] He has difficulty identifying problems facing him and defining his options. He cannot seem to understand the problem and make a decision. He does not trust his

own judgment either medically or as it relates to his real estate investments. He has trouble making day-to-day life decisions. Although the plaintiff realizes that he must learn to allow others to help him, he has a great deal of difficulty accepting that fate.

[476] The plaintiff submits that an award in the range of $200,000 to $225,000 for non-pecuniary damages is appropriate in this case, He relies on the following decisions:

(a) *Roussin v. Bouzenad*, 2005 BCSC 1719 ($200,000);

(b) *Lines v. Gordon et al. and ICBC*, 2006 BCSC 1929 ($225,000);

(c) *Sirna v. Smolinski*, 2007 BCSC 967 ($200,000);

(d) *Dikey v. Samieian*, 2008 BCSC 604 ($215,000);

(e) *Young v. Anderson*, 2008 BCSC 1306 ($200,000) and

(f) *Burdett v. Eidse*, 2011 BCCA 191 ($200,000).

[477] In *Roussin*, the plaintiff was a full-time associate producer for a local television station, who was characterised as being “hard-working, focussed, informed and a good researcher who wanted to excel”, but was considering a change in employment (at paras. 28-29). As the plaintiff was proceeding through an intersection, she was struck by the defendant’s vehicle in a “T-bone” fashion (at para. 5). The plaintiff sustained a number of injuries in the accident including a MTBI with significant effects including loss of executive function, dizziness and vertigo, tinnitus and headaches. She was unable to pursue her chosen career path, and had severely limited employability (at paras. 95-96). Mr. Justice Kelleher awarded non-pecuniary damages of $200,000 (para. 97).

[478] In *Lines*, the defendant, was travelling behind the plaintiff and attempted to overtake the plaintiff on the left side when the plaintiff was attempting to make a left-hand turn, resulting in a T-bone impact (at para. 1). The plaintiff sustained MTBI and post-concussive syndrome that caused “profound” ongoing effects including severe

headaches with vestibular dysfunction, fatigue, visual difficulties, sexual dysfunction, depression and problems higher cognitive function and capacity such as memory, concentration, decision making and organization (at para. 219). He also lost his future standing in the community as a skilled journeyman mechanic or marine engineer, and his enjoyment of his pre-accident hobbies and activities (at para. 219). Mr. Justice Lander awarded non-pecuniary damages of $225,000.

[479] In *Sirna,* the plaintiff was rollerblading across a marked cross-walk when she was hit by the defendant's vehicle (at para14). The plaintiff was an accomplished athlete who anticipated enrolling in a dental hygienic course (at paras. 41 and 44). As a result of the accident, the plaintiff sustained a traumatic brain injury resulting in permanent functional deficits including deficits related to attention and memory, and impaired sense of smell and additional fatigue, reactive depression, and a sense of the loss of the person that she was and could have been before the accident (at para. 111). Mr. Justice Macaulay assessed non-pecuniary damages at $200,000 (at para. 117).

[480] In *Dikey*, the plaintiff was standing in a roadway when he was struck by a sports utility vehicle driven by the defendant. As a result, the plaintiff suffered a number of injuries, the most significant being a traumatic brain injury (at para. 2). After the accident, he had continuing cognitive problems including limitations with memory, planning, attention, organizing, awareness, concentration, decision making, judgment, reasoning, language, mental flexibility, abstract thinking and calculations. He had a tendency to forget to eat and take medications regularly, and to forget appointments (at para. 110). It was unlikely that those problems would improve materially (at para. 120). Prior to the accident, the plaintiff was social and athletic with the ambition to work in the hotel industry and the courage to come to Canada from Turkey to pursue that education (at para. 114). Because of the accident, the plaintiff was unlikely to work, and lost the self-esteem, enjoyment and income that would have been available to him from work (at para. 142). Madam Justice Gray assessed non-pecuniary damages of $215,000 (at para. 146)

[481] In *Young*, the plaintiff's vehicle was rear-ended in a truck driven by the defendant (at para. 1). At the time, the plaintiff was almost 51 years old and had been employed for many years as a cameraman and director of photography in the film industry (at para. 3). As a result of the accident, the plaintiff was found to have sustained a MTBI with tinnitus, personality changes and cognitive deficits, as well as chronic pain, headaches and depression. It was anticipated that the plaintiff would be chronically unemployable in his chosen profession for the rest of his life. Madam Justice Boyd assessed non-pecuniary damages of $200,000 (at para. 126).

[482] In *Burdett*, the plaintiff was involved in two accidents (at para. 1). He claimed that as a result of the first accident, he suffered a MTBI and was no longer able to work at his construction and renovation business (at para. 37). At trial, Madam Justice Loo concluded that the plaintiff suffered soft tissue injuries and an MTBI from the first accident, was unlikely to recover and was no longer capable of working as a contractor and was competitively unemployable (at para. 41). She also found that the MTBI caused severe cognitive impairments including an inability to focus, sleep, concentrate or multi-task, and that the plaintiff experienced frustration, emotional liability and a lack of interest in the activities that used to give him pleasure (at para. 42). The Court of Appeal for British Columbia upheld those conclusions on appeal, and thus did interfere with the trial judge's assessment of non-pecuniary damages at $210,000 (at para. 51).

[483] The defendants submit that the plaintiff is not entitled to any award for non-pecuniary damages other than a "modest" award for soft tissue injury. Moreover, they argue that the plaintiff had a history after the Accident of not complying with the treatment and medication regimes of his treating physicians and that his failure to do so is indicative of the minor severity of his post-Accident symptoms.

[484] Having considered the principles set out in *Stapley*, the ordeal that the plaintiff has gone through, the impact the Accident has had on the plaintiff's life including the loss of a vibrant medical career that was very important to him, as well as the cases

relied upon by counsel, I find that an award of $200,000 for non-pecuniary damages is appropriate.

#### *(ii) Past Income Loss from Medical Practice*

[485] Loss of past income is a hypothetical assessment guided by the plaintiff's earnings prior to the Accident. It is not an exact calculation: S*mith v. Knudsen* 2004 BCCA 613 at para 34. The Court must consider both positive and negative contingencies that, but for the Accident, the plaintiff's income between the Accident and trial would have been more or less than it was prior to the Accident.

[486] The defendants submit that, by the fall of 2010, the plaintiff had received from a psychiatrist, Dr. Riar, a prognosis that he would improve within six months. The Court was not provided with any evidence from Dr. Riar despite both the plaintiff and the defendants having listed him as a witness in their respective trial briefs.

[487] The defendants further submit that the plaintiff was not compliant with the treatment recommended by Dr. Remick, who began treating him in April 2008. They say that, had he done so, he likely would have been able to return to work within six months (based upon Dr. Riar's prognosis, which is not in evidence) and that the plaintiff should be precluded from recovering any past wage loss after October 2008.

[488] I reject the defendants' submissions in this regard. I cannot accept opinion that was not tendered in evidence. Dr. Riar did not give any evidence let alone evidence with respect to how the plaintiff's failure to adhere to a treatment plan might or might not have affected that prognosis.

[489] To the extent that the defendants suggest the plaintiff did not mitigate his losses, I note that the plaintiff wanted and continues to want nothing more than to return to his life as it was prior to the Accident. He did not return to work as an emergency room physician because he was physically and mentally incapable of doing so. He attempted to work in surgical assists and in a walk-in clinic but was unable to continue for the reasons I have set out above. He earned a total of

$14,553.90 during those attempts. I have no doubt that if the plaintiff could have productively worked more as a physician he would have done so.

[490] It is telling that Dr. Kausky, whose evidence I accept unreservedly, testified that the plaintiff tended to minimize his symptoms, resisted her attempts to put limitations on his activities, wanted to return to work as soon as possible and did not react well to her recommendation that he rest both mentally and physically.

[491] I find that prior to the Accident, the plaintiff had no medical impairment preventing him from continuing his work as an emergency room doctor. Although the defendants attempted to make much of the plaintiff's telephone call to ICBC less than two weeks before the Accident in respect of which ICBC noted that the plaintiff "continues to have problems with his hands", I accept the plaintiff's evidence that the carpal tunnel syndrome in his hands and arms had resolved by the summer of 2006 and that he must have been misunderstood by ICBC. I find that his inability to concentrate and the poor short-term memory he demonstrated while performing surgical assists are attributable to the injuries he suffered during the Accident.

[492] Mr. Benning's past wage loss calculations were based upon an average of the plaintiff's income during the five years immediately preceding the Accident. The defendants submit that the baseline should be the plaintiff's income for the three years immediately preceding the Accident, thereby excluding the plaintiff's peak income in 2002.

[493] Mr. Benning's calculations assume personal income tax rates and not the rates that would had applied had the plaintiff followed the tax planning which was in place prior to the Accident, including the use of a professional corporation. The result is the least favourable to the plaintiff.

[494] Mr. Benning's income analysis reveals that the plaintiff's income was trending upwards. In my view, it is more probable than not that the plaintiff's annual income between the date of the Accident and the date of trial would have been at least $346,000. That is the figure that should be used to calculate his past income loss.

[495] I accept Mr. Benning's calculations that based upon an annual income of $346,000 the plaintiff's net income loss is $1,453,595. The plaintiff's earnings from surgical assists and the walk-in clinic must be deducted from this amount. His gross earnings of $14,553.90 reduced by 41.1% for income tax results in a deduction from his net past income loss of $8,572.

[496] The plaintiff is entitled to an award of $1,445,023 for past income loss.

#### *(iii) Future Loss of Earning Capacity from Medical Practice*

[497] The plaintiff is entitled to compensation for future losses he has shown are a real and substantial possibility, quantified by estimating the chance of the loss occurring: *Athey* at para. 27; *Perren v. Lalari* 2010 BCCA 140 at para. 30. The valuation of the loss may involve a comparison of what the plaintiff would probably have earned but for the Accident with what he will probably earn in his injured condition.

[498] The plaintiff had no interest in altering his level of work activity before the Accident. He loved his job and had no plans to retire from it. As a result of the Accident, the plaintiff is significantly limited by fatigue, poor memory, inability to concentrate and poor decision making.

[499] I accept the opinions of Dr. Kausky, Dr. Anton, Dr. Teal and Mr. Hohmann that the plaintiff is not capable of returning to work as a physician or to any other occupation requiring higher cognitive function and multi-tasking due to his cognitive deficits. Any future employment will be limited to non-complex routine work.

[500] Each of Drs. Sexton and Teal opined that the plaintiff was and will continue to be disabled from working as an emergency room physician. Drs. Remick and Anton went further. They opined that the plaintiff is totally disabled from any form of competitive employment.

[501] The defendants did not offer any evidence to suggest otherwise if the Court found, as it has, that the plaintiff suffered a debilitating concussion as a result of the Accident.

[502] Taking into account labour market contingencies related to the plaintiff having become disabled or deciding to work part-time, Mr. Benning calculated the plaintiff's future loss of income from his inability to work as an emergency room physician, assuming an annual loss of $346,000 to age 70, to be $4,072,410.

[503] Assuming lost annual future income of $346,000, an application of Mr. Gosling's multipliers (which assume average participation rates for health care professionals) results in a future loss of income of $3,561,032 (using economic multipliers) and $4,372,402 (using actuarial multipliers).

[504] In my view, Mr. Benning's economic multipliers are appropriate in this case. The evidence is overwhelming that there was a real and substantial possibility the plaintiff would have continued working as an emergency room physician at the WHCC, likely until age 70. He was not just an "average" physician. He worked longer hours than any other physician at WHCC. He loved his work there.

[505] As a result of the Accident, the plaintiff is not competitively employable as a physician. Allowance must be made for the contingency that the assumptions upon which the foregoing analysis is based may prove to be wrong: *Reilly v. Lynn*, 2003 BCCA 49 at paras. 101. The plaintiff's symptoms may improve, with treatment or otherwise. He may secure some form of employment capacity. My best estimate is that there is a 10% chance of one or more of these contingencies transpiring.

[506] The plaintiff is entitled to an award for future loss of earning capacity from his medical practice of $4,072,410 x 90% = $3,665,169.

#### *(iv) Future Loss of Earning Capacity - Real Estate Investments*

[507] The plaintiff claims significant damages in respect of the lost opportunity to purchase and develop further rental properties. He says that the evidence

establishes he had a proven track record of successful real estate development. He says the opportunity is not mere speculation but that there was a real and substantial possibility he would have accumulated at least a further $7 million in real estate equity had the Accident not occurred.

[508] I note, however, that of the eleven properties currently owned by the plaintiff, Ms. Roth and/or the Professional Corporation, only four - the Queen's Avenue, Connaught Drive, Toronto and Dunbar properties - were purchased with the intention of renovating and renting them. The West 14th Avenue, St. Moritz and Crabapple Drive properties were initially purchased or built as the plaintiff and Ms. Roth's primary residences. The Kelowna property was purchased as a potential retirement home. The Wasaga Beach property was the plaintiff's family's vacation cottage. The Snowbridge property was built by the plaintiff on a vacant lot for the purpose, at least in part, of a winter ski vacation home. The West 7th Avenue property was acquired by Ms. Roth with inheritance money she received from her father.

[509] There is no doubt that the plaintiff is now less capable of developing real estate property. However, it is pure speculation that any such property would have been identified much less purchased, renovated and rented for reasonable amounts. It is equally speculative whether they would have increased in value. The mere fact that four real estate investments had been successful in the past does not mean that they will continue to be successful or that any future investments will prove to be prudent. The real estate market ebbs and flows based on world factors that cannot be predicted. At a minimum, expert evidence from economists and real estate professionals regarding market trends and opportunities was required. No such evidence was led by the plaintiff.

[510] Moreover, the plaintiff failed to tender any cogent evidence regarding the fair market value of his various rental properties or the expenses associated with them, including property taxes, insurance costs, strata fees and building, renovation, maintenance and improvement costs. The Court is unable to determine the actual

increase in equity of these properties because there was insufficient evidence lead concerning the capital cost of the properties.

[511] I accept that, prior to the Accident, the plaintiff and Ms. Roth had planned to continue look for real estate investment opportunities. I find the plaintiff had a track record of acumen and success and has established a real and substantial possibility that, if suitable properties could have been found, they would have purchased, renovated and rented them. The plaintiff has lost genuine potential in this regard.

[512] The evidence is far too speculative to attempt any form of accurate calculation of an award based upon losses from possible future real estate investments. In such cases, the Court must do its best to assess the loss: *Adamson v. Charity*, 2007 BCSC 671 at para. 278. The overall fairness and reasonableness of the award must be considered taking into account all the evidence. It requires an assessment of damages, not a calculation according to some mathematical formula: *Ibbitson v. Cooper*, 2012 BCCA 249 at para 19.

[513] Considering the recent investments that plaintiff made prior to the Accident, that he was "on a roll" with that aspect of his investment strategy and that it is impossible to forecast the future with any accuracy, particularly given the speculative real estate market, I find that a fair and reasonable award for the plaintiff's loss of future earning capacity in respect of real estate investments is $500,000.

#### *(v) Special Damages*

[514] The plaintiff spent $45,507 for OT treatments with Laurie Nelson ($39,831), counselling sessions with a psychologist, Dr. Jung ($2,520) and a concussion clinic with Dr. Iverson ($500). The defendants contest their obligation to pay these amounts, arguing first that Ms. Nelson's charges greatly exceed those that Tracy Berry recommended as necessary, and second that there is no evidence to demonstrate that Dr. Jung's and Dr. Inverson's expenses were necessary.

[515] The plaintiff benefitted significantly from the sessions with Ms. Nelson. They resulted in him understanding his condition and becoming better able to manage it.

Although the number of sessions exceeded those initially recommended by Ms. Berry, I find that they were necessary. The expenses associated with Ms. Nelson's treatments are allowed.

[516] No evidence was proffered regarding the reason for or necessity for the sessions with Drs. Jung and Iverson. Those expenses are not allowed.

[517] The plaintiff also claims $63,000 for the cost of a nanny for his children commencing September 2010 to the date of trial (3 years at $21,000 per year). The defendants say these expenses would have been incurred regardless of the Accident.

[518] The uncontroverted evidence is that the plaintiff and Ms. Roth hired a nanny to help them function because the plaintiff was unable to mind the children and function in the household because of his Accident-related injuries. Ms. Roth expects that a nanny will be required until her youngest children are in school. The nanny is paid $16,800 per year net of her room and board.

[519] I accept Ms. Roth's evidence in this regard. The plaintiff is entitled to compensation for the cost of a full-time nanny for the three year period preceding the trial at $16,800 per year.

[520] The plaintiff is entitled to special damages in the amount of $90,231.

***(vi) Cost of Future Care***

[521] The amounts claimed for future care costs must have some evidentiary link to a physician's assessment of pain, disability and recommended treatment, and the care recommended by a qualified health care professional: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39. In that regard, the Court must perform an analysis of each item of future care cost being sought by the plaintiff: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 32.

[522] In Dr. Kausky’s opinion the plaintiff will likely require ongoing manual therapy (physiotherapy, massage therapy, chiropractic therapy) and a personal trainer. He may also require occupational therapy, counseling and a neuropsychologist.

[523] Ms. Berry’s assessment of the plaintiff’s future care costs is flawed to the extent that it relies in part upon assessments and consultations that were not put in evidence (Drs. Wilkinson, Riar and Jung). Moreover, many of Ms. Berry’s recommended treatments have already been undertaken or abandoned.

[524] The plaintiff claims the following future care costs (present valued):

(a) *Trazadone* ($6,229): This amount assumes the plaintiff will take this drug daily. The evidence shows that he only takes it intermittently. I agree with the defendants that the claim should be reduced by half to $3,130.

(b) *Physiotherapy* ($900): This claim is based upon Ms. Berry’s 2011 opinion. The evidence is that the plaintiff is not taking either physiotherapy or massage therapy. In my view, it is unlikely that the plaintiff will avail himself of this treatment modality in the future and hence nothing should be award under this head. This claim is disallowed.

(c) *Occupational Therapy – past* ($8,391): This part of the claim has been accounted for under the heading “Special damages”.

(d) *Occupational Therapy – ongoing* ($2,976): The plaintiff has benefited significantly from this therapy. This claim is allowed in full.

(e) *Psychology* ($38,435): The plaintiff began psychological counseling at the recommendation of Dr. Anton but discontinued it for approximately 15 months and has only recently resumed it. In my view, it is likely he will continue to avail himself of this recommended treatment but not to the degree claimed. I find that an allowance of $1000 per year is

reasonable. Using a multiplier of 16.814, the plaintiff is entitled to an award of $16,814 under this head.

(f) *Homemaking, Yard and Home Maintenance* ($150,130): This claim is based upon the plaintiff having difficulty performing tasks around the home. I accept that the plaintiff has limitations in this regard. However the evidence is not that the plaintiff is physically unable to perform them but rather that he becomes symptomatic and it takes him longer to perform them. Moreover, to the extent that the claim for childcare is allowed, Ms. Roth will be freed up to perform these tasks, which the evidence shows she is doing. I am not satisfied that the plaintiff has demonstrated the required link between these claims and his disability. This claim is not allowed.

(g) *Childcare* ($11,369): Ms. Berry recommends that the plaintiff and Ms. Roth have childcare for 4 hours per day Monday to Friday and 12 hours over the weekends, for a total of 32 hours per week. This is best provided by a full-time live-in nanny. I accept Ms. Berry's opinion that childcare will be required until Nicholas and Isabella are 11 years of age, that is until July 2019. The plaintiff is entitled to a present value award of $11,369 under this head.

(h) *Rehabilitation Assistance* ($6,942): The plaintiff used a rehabilitation assistant in 2011 for approximately 1-1/2 years but discontinued that service. I am not satisfied that the plaintiff will avail himself of this service in the future. This claim is disallowed.

[525] In summary, the plaintiff is entitled to an award of $34,289 for the cost of his future care.

## G. CONCLUSION

[526] The plaintiff is entitled to judgment against each of Rajinder S. Gill, British Columbia Transit and Whistler Transit Ltd., John Doe and Jack Doe Company Ltd., jointly and severally, for the following amounts:

| | | |
|---|---|---|
| (a) | Non-pecuniary damages: | $ 210,000; |
| (b) | Past income loss: | $ 1,445,023; |
| (c) | Future Loss of Earning Capacity-Medical Practice: | $ 3,665,169; |
| (d) | Future Loss of Earning Capacity-Real Estate: | $ 500,000; |
| (e) | Special Damages: | $ 90,231 |
| (f) | Cost of Future Care: | $ 34,289 |
| **Total** | | **$ 5,944,712** |

[527] The action against the Insurance Corporation of British Columbia is dismissed.

[528] The parties are at liberty to speak to costs.

"G.C. Weatherill J."
G.C. Weatherill J.