# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Davies v. Elston,*
2014 BCSC 2435

Date: 20141223
Docket: M123029
Registry: Vancouver

Between:

**James W. Davies**

Plaintiff

And

**Kevin Elston and**
**Pajo's (Garry Point) Restaurant Ltd.**

Defendants

Before: The Honourable Madam Justice S. Griffin

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Plaintiff: | Marc Kazimirski<br>Pauline V. Gardikiotis |
| Counsel for the Defendants: | Jeffrey W. Joudrey<br>J. Gill (Articling Student) |
| Place and Dates of Trial: | Vancouver, B.C.<br>September 2-5, 8-12, 2014 |
| Place and Date of Judgment: | Vancouver, B.C.<br>December 23, 2014 |

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## I. Introduction

[1] For Jim Davies, riding a bicycle is as natural as breathing and walking. He has been doing so for over six decades, as a Canadian national and international athlete in his youth and as a way of life ever since. He seems not only to love to ride a bicycle; he lives to ride a bicycle.

[2] In his 70s, he continued to ride over 10,000 kilometers annually.

[3] On October 15, 2011, at age 77, he was riding along one of his regular routes on Railway Avenue in Richmond, BC with his son, Gary Davies. It was a sunny day, around 11:30 a.m. They were in a designated bike lane of about six feet wide, riding side by side with Jim Davies riding on the outside, next to the road. As experienced and strong cyclists, they were travelling at a relaxed speed of approximately 25 kilometres per hour ("kph").

[4] At the start of their journey in the bike lane, they were on a part of Railway Avenue where on the right of the road was a parking lane, to the left of the parking lane was a bike lane, and then to the left of the bike lane was the road for vehicles.

[5] They saw a truck parked to the right of the bike lane with its left sideview mirror extending into the bike lane.

[6] Gary Davies made a comment about the truck's mirror. He spoke in a loud voice as the plaintiff is partly deaf and does not wear hearing aids when cycling

[7] Mr. Elston owned the truck and was nearby in his front yard. He heard the comment about his truck mirrors. He got in his 2011 Ford F350 pickup truck and decided to follow the two cyclists to confront them.

[8] When Mr. Elston caught up to the two cyclists they were still riding in the bike lane, but now on a stretch of Railway Avenue where the bike lane is on the far right of the road, with no parking lane next to it. This part of Railway Avenue is a long straight stretch with nothing obscuring the view ahead. The bike lane is bordered by

a curb on the right and is six feet wide, with a painted continuous white border on the left bordering the lanes of vehicular traffic.

[9] To the cyclists Mr. Elston and his large truck appeared suddenly and unexpectedly. Mr. Elston pulled up close to the cyclists. He had his passenger window rolled down.

[10] There were words exchanged as the truck drove down the road next to the cyclists riding their bikes.

[11] The truck was close enough to Jim Davies that he was able to put his hand out and rest it on the passenger side window frame.

[12] After a brief exchange, probably less than 10 seconds, the truck drove away, Jim Davies fell, and this lawsuit has ensued.

[13] It is not disputed that the truck did not actually collide with Jim Davies. It is also not disputed that when Jim Davies fell off his bike his hip smashed into the curb, causing serious injuries to his right hip and pelvis and leaving him with lasting injuries.

[14] Jim Davies says that the fall was the fault of the truck driver, Mr. Elston, who is responsible for his injuries and related damages.

[15] Mr. Elston denies being responsible for Jim Davies' bicycle crash. Alternatively, he says that if he is responsible, he is only partly responsible and that Jim Davies was contributorily negligent, and that his son, Gary Davies, was also partly negligent, due to the fact they were riding two abreast in the bike lane and due to the fact that Jim Davies put out his left hand on the truck's passenger side window frame when the truck was right next to him.

[16] It is conceded that if Mr. Elston is liable in negligence, the corporate defendant and owner of the vehicle is jointly and severally liable. When I refer to "the defendant" in the singular, I am referring to Mr. Elston.

## II. Issues

[17] This case resolves mostly around the factual issue as to how the accident occurred, with each side challenging the other's credibility. The defendants say that the plaintiff has not met the burden of proof to establish that Mr. Elston's conduct caused the accident.

[18] The defendants also raise a legal issue in the plea of contributory negligence, namely, whether it is legal for two bicycle riders to ride side by side in a designated bike lane, or whether this is prohibited by the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [*MVA*].

[19] It is not contested that informing the common law standard of care owed to others on the road are provisions of the *MVA* which prohibit drivers and cyclists from operating a vehicle or a cycle on a highway without due care and attention or without reasonable care and attention for other persons using the highway: s. 144(1) of the *MVA* in the case of drivers of motor vehicles, and s. 183(14)(a) in the case of cyclists.

[20] I will address the issues in this order:

1. Whether the defendant negligently caused the accident.
2. Whether the plaintiff was contributorily negligent.
3. Whether Gary Davies was partly negligent.
4. Whether the defendant is liable for a later fall that the plaintiff suffered.
5. If the defendant's liability is established, what damages ought to be awarded for the plaintiff's injuries:
    a. nature of injuries;
    b. special damages;
    c. loss of past income and future earning capacity;
    d. cost of future care;

e. in-trust claim; and

f. non-pecuniary damages.

## 1. Did the Defendant Negligently Cause the Accident?

[21] The legal test for causation applicable here is whether the plaintiff can prove on a balance of probabilities that but for the defendant's negligent conduct, the plaintiff's fall from the bicycle and injuries would not have occurred: *Ediger v. Johnston*, 2013 SCC 18 at para. 28; *Clements v. Clements*, 2012 SCC 32 at paras. 8, 13.

### A. Jim Davies' Evidence

#### *i. The Plaintiff's Background*

[22] The plaintiff's background is relevant to two issues: his bike riding abilities, which goes to the question of how he came to fall off his bike, and his pre-accident state of health and way of life, which may go to the issue of damages, if any.

[23] The plaintiff was born 80 years ago in Vancouver and has lived in Burnaby for most of his adult life.

[24] As a young child he was exposed to bicycling by his father and uncle. Both men worked for the Canadian National Telegraph Company, delivering telegrams by bicycle. They also did some track racing, including at an auditorium on Denman St. in Vancouver, and became national track champions. They were both sprinters. The plaintiff's uncle Jim raced for Canada in the Olympics.

[25] As a child the plaintiff rode his bicycle from his parents' house to his grandparents' house a mile or two away.

[26] At age 14 the plaintiff rode in his first race which was a race around Stanley Park. It was handicapped by ability. As the plaintiff described it "I guess I didn't have a lot of ability cause I started first but I finished first too". He was happy to have his name placed on the same trophy as where his father and uncle had their names.

[27] The plaintiff left school at the young age of 16, not completing high school. He worked in shoe manufacturing briefly and then in saw manufacturing for approximately 20 years.

[28] The plaintiff enjoyed racing in short road races.

[29] An outdoor cycling track was built in Vancouver in 1953, in anticipation of the British Empire Games of 1954. The track was made of two-by-four boards set on their edge and banking at an angle of 45 degrees.

[30] The plaintiff became an avid track racer. At the age of 20 he won the Canadian national championships in 1954. That year he also became a member of Canada's national team in Vancouver's British Empire Games, competing in the 1000 metre sprint and the 1000 metre time trial.

[31] The plaintiff's speed on the track earned him a spot as the only Canadian competing in these events at the Olympic Games in Melbourne, Australia in 1956, at age 22.

[32] The evidence of several witnesses established that track racing requires the highest level of bicycle riding skill. If a cyclist is not fast enough he will fall off the track. The bike has no gears and no brakes.

[33] Track cyclists can be packed closely together as they race, so close together that their bodies can touch. Track racers learn how to avoid having any other bike or cyclist touch their handlebars, as once the handlebars are touched the cyclist will lose control and crash. Track racers avoid this by using their shoulders or elbows to touch another cyclist's body if too close or by occasionally reaching out with a hand against another cyclist's hip, to maintain distance even if the distance is only a matter of inches.

[34] Track riders are moving at high speeds and need to have quick reaction times.

[35] The evidence was that a cyclist's track riding skills are transferable to the road. Someone with experience on the track will have greater skill than the average bike rider in maintaining balance when riding close to other riders, for example by use of shoulders or elbows or hands so as to protect the handlebars from touching another cyclist or bike and by quick reaction times.

[36] The evidence was consistent that the plaintiff had the highest level of bike riding skills and knew how to keep alert and to keep distance around him when riding so as to avoid crashes with other riders.

[37] The plaintiff stopped track racing in 1958 but continued road cycling.

[38] He was married in 1959 and he and his wife had two children, Neil and Gary.

[39] In 1963, the plaintiff began riding more regularly and competing in some road races. He did not race for a few years but then returned to road racing in 1971. He continued racing over the years, with his last race being in 2004, at age 70.

[40] There were some periods during that time that he did not ride his bike. In 1971, he had back surgery, a spinal fusion, and so his cycling stopped or decreased for a few months but he soon got back up to speed. In 1999, he was diagnosed with a men's health problem unrelated to the issues in this case, but which led to him ceasing cycling for approximately two years. During that sojourn from cycling he stayed active running and hiking, including running a marathon and hiking the Grand Canyon.

[41] The plaintiff's first marriage ended. In 1988 he met his current wife, Barbara Davies. They married in 1992. She became an avid cyclist. They cycled several times a week, often together and sometimes in groups. Although she is 15 years younger than the plaintiff, Barbara Davies did not have the same extensive cycling experience and so had to work up to her husband's level. She became a very strong women's cyclist in the masters category, as she trained with and learned how to keep up with her husband. The two of them took many cycling holidays in southern California in the winters.

[42] As well, when the winter weather impeded cycling in Vancouver, the plaintiff and his wife often went on vigorous long walks or hikes. They would still cycle when the weather was dry and it was not too cold.

[43] The plaintiff was very conscientious about his fitness, keeping a daily diary of his workouts, eating nutritiously, and avoiding alcohol.

[44] Leading up to the October 15, 2011 accident, he cycled approximately the following distance in kilometres annually:

| | |
|---|---|
| 2005 | 10,536 km |
| 2006 | 8,640 km |
| 2007 | 10,505 km |
| 2008 | 10,706 km |
| 2009 | 12,118 km |
| 2010 | 11,694 km |

[45] By October 15, 2011, the plaintiff had cycled 9,078 km that year.

[46] In addition to cycling with his wife and friends, the plaintiff cycled with his two sons.

[47] Both of the plaintiff's sons had learned to cycle as children and Neil Davies became a national champion in track racing. Gary Davies had lost the habit of cycling but started up again in August 2011, riding with his father regularly.

[48] One of the routes that the plaintiff often rode on his bike, with his wife, his son Gary Davies or others was from Burnaby to Richmond and around Richmond. This route often took him on a designated bike lane on Railway Avenue in Richmond. This was where he was riding with his son, Gary Davies, on the day of the accident.

### *ii. The Plaintiff's Evidence of the Accident*

[49] The plaintiff said that when he and Gary Davies came upon the parked truck with its mirror extending into the bicycle lane, one of them commented to the effect "geez that guy's inconsiderate, why doesn't he push his mirrors in". They had to ride

around the mirror with the plaintiff having to leave the bike lane and ride into the road and then back into the bike lane. The plaintiff said he could not remember if he or his son made the comment, but it was not directed at anybody and was just intended to be a comment shared between the two of them. He did not see anybody else around when the comment was made.

[50] The plaintiff said he did not give it another thought as he and his son continued riding along Railway Avenue. They came to a traffic light which was red, stopped, and then started up again when it turned green.

[51] As they continued on Railway Avenue they stayed in the bike lane, which was six feet wide, riding side by side so they could talk. They were riding approximately 25 kph. The plaintiff was on the left side of the bike lane, probably six to eight inches inside the line, and Gary Davies was riding on his right.

[52] Then the plaintiff heard a rumble of noise and a truck pulled up alongside him, with the person inside hollering at him. We now know this to be the defendant Mr. Elston. At first the plaintiff thought someone might have pulled up to ask for directions, but then he realized that this was a person who was very upset.

[53] The plaintiff has impaired hearing but does not wear his hearing aids when cycling and cannot hear people speaking at a normal volume. His left ear is more hearing impaired than the right. Nevertheless on this day due to the volume of the driver's voice he knew the person was hollering or screaming and he could hear what he was saying.

[54] He said that when the truck driver started hollering Gary Davies pulled ahead a little bit so that there would be more space between them.

[55] The plaintiff testified that the driver said "what's wrong with my mirrors", "you don't like my mirrors", and while the plaintiff does not remember all of the words spoken he remembers that the person kept hollering and also said something to the effect of "what are you riding two abreast for anyway", and "I ride bikes too" and kept referring back to his mirrors. The plaintiff said to him "cool it, let it go".

[56] According to the plaintiff's evidence in chief the driver drove the truck up very close to the bike lane and was crowding him. The plaintiff said that he never left the bike lane, and that he was looking at the front of the driver's vehicle, to keep an eye on it so that he could stay clear of it. He explained that he put his hand on the window frame of the truck because he wanted to stabilize himself, as the truck was getting closer and closer to his handlebars and if his vehicle touched his handlebars, he would be "a goner". The plaintiff wanted to stay at least a foot or a foot and a half away from the vehicle, and so put his hand out so he could not let the truck get too close to his bike.

[57] The plaintiff said that he put his hand on the frame of the rolled-down passenger side window to steady himself, saying "cool it… what's wrong?" The truck backed off a little and the plaintiff took his hand off. The truck then came closer again and the plaintiff put his hand back up on the frame of the passenger side window. Then the driver took off and according to Jim Davies that sent him flying and he crashed his bike.

[58] The plaintiff agreed that it could be dangerous to hold onto a moving vehicle. However, the sense of his evidence was that he felt he needed to do so to protect himself because the truck was getting so close to him.

[59] The plaintiff testified that when this was happening he was scared for his life. It was a big truck and the driver's conduct was so aggressive.

[60] The plaintiff said that the whole interaction when the truck pulled up beside him was very quick, maybe eight to ten seconds.

[61] In cross-examination, the plaintiff was questioned about whether the truck crossed into the bike lane. The plaintiff said he was not sure as he was so busy trying to keep his bike on the road and handlebars away from the truck. However, it was his evidence that the truck was very close to the bike lane and the side view mirror was over the line. The plaintiff also said that he thinks the truck tires were on the line when the truck was crowding him and just before the truck took off.

[62] Asked why he did not stop, the plaintiff said "stop how". He explained it did not enter his mind to stop because he had nowhere to go, there was no intersection where they could turn and they were in the middle of a big long block. He thought the man would just go his way and they would go theirs and he did not anticipate that this was going to happen.

[63] The plaintiff was also pressed on why he did not just slow down. The plaintiff said he couldn't slow down because the man was raging at them, Gary Davies was on the other side of him, he had one hand on his handlebars and the other on the vehicle and if he had braked like that he would have fallen over. He thought it was more stable to have one hand on the window to control his upright position and not fall over when the truck was crowding him.

[64] It was suggested to the plaintiff in cross-examination that his and Gary Davies's bicycles bumped wheels. The plaintiff denied this and said no parts of their bikes came together.

### B. Gary Davies' Evidence

[65] Gary Davies' evidence regarding the accident was that he and his father were on their regular Saturday ride, riding side by side in the bike lane with his father to the outside, when he saw the truck parked in the parking lane up ahead with its left side view mirror extending into the bike lane about the height of a cyclist's head or shoulders. He announced "mirrors" to alert his father and they moved around it, with his father moving out past the bike lane line and then back into the lane. Gary Davies also made a comment to the effect of "Can you believe someone would leave their mirrors open like that".

[66] Gary Davies said he spoke in a loud voice because his father is deaf. Gary Davies denied swearing in his initial comment about the mirrors. He explained he has too much respect for his father to speak that way around him.

[67] Gary Davies denied knowing that there was someone around other than his father when he made the comment about the truck mirrors. He denied being

offended and angry, rather he said he was surprised someone would do something that unsafe as leave the mirror extended into the bike lane because it was such a known bike route, and that was the gist of his comment intended for his father.

[68] Gary Davies said there was not a lot of traffic. There was no sun in their eyes, no trees or anything else obscuring their vision, and the bike lane was nice and wide, about six feet wide, which for them was lots of space to ride beside each other.

[69] He and his father continued to ride their bikes along Railway Avenue when all of a sudden a truck rolled up beside them, next to his father. Gary Davies thought initially that the person must be asking for directions. He then noticed the conversation was becoming louder and more heated and the vehicle was coming closer to them. He heard the person say something about not supposed to be riding two abreast, his father made a comment that they were riding in a bike lane and the person kept screaming that they should not be riding two abreast, he rides too and they should be riding single file.

[70] Gary Davies testified that as the vehicle was getting closer, it started to encroach into the bike lane. He did not move from his evidence that he saw the truck's tires enter the bike lane but he said it was a matter of inches. He agreed that if his father was looking forward his father would have had a better view of where the tire was.

[71] Gary Davies said he saw his father put up his hand, and Gary Davies moved forward to give his father more room because they were getting squeezed. He only pulled ahead half a bike length to his father's right and forward. Gary Davis was then parallel to the truck's mirror and his father would have been next to the truck's passenger door.

[72] Gary Davies agreed that the reason he pulled forward with his bike was to make more room for his father so that his father could slow down and pull to the right behind him. He agreed that if his father was not hanging on to the vehicle, it was possible he could have done that. From the time his father put up his hand and

Gary Davies moved forward with his bike he thought it was only 1.5 to 2 seconds before the crash.

[73] Gary Davis said he could see the driver looking at them and leaning towards them when he was screaming at them. His father was saying to the driver "let it go, just let it go".

[74] Gary Davies also denied swearing or yelling at the driver of the truck. He explained that he knew it would just escalate the situation if he did that, infuriate the person who was already extremely mad, and that would not help their situation. He was worried about his father's safety and his own.

[75] Gary Davies agreed in cross-examination that when the driver started to pull forward he said to the driver "enjoy your day" and waved with one hand. He said it was not intended to be sarcastic; he was trying to communicate to the effect of they should each just get on with their day.

[76] Gary Davies denied that his bike wobbled when he waved or that the tire of his bike made contact with his father's bike or that he bumped his father's handlebars.

[77] Gary Davies did not hear the truck accelerate, he just saw that it did so. Gary Davies said he then heard his father scream and the metal sound of a crash. The vehicle was just accelerating forward but was still "basically beside us" at that point.

[78] He turned around and saw his father on the ground. He denied that their bicycles touched first.

[79] Gary Davies also denied that there was any storm grate that played a role in the accident. He pointed out that they do not ride so close to a curb as to touch a storm grates because that is where garbage is too.

[80] Gary Davies said he did not think about stopping, it happened too fast, in six or eight seconds, and if they slammed on the brakes they could crash and his father could fall into the vehicle or traffic.

[81] After an ambulance came to the scene, Gary Davies asked the attendant to call the police. He felt that the driver had caused his father to crash and he wanted the police to investigate it.

[82] A police constable, Cst. Graham Morgan, came to the scene and spoke to Gary Davies after his father was taken away by ambulance. Gary Davies recalls that Cst. Morgan did not make any notes and asked few questions.

### C. Constable Morgan's Evidence

[83] Cst. Morgan was called as a witness by the defendants.

[84] He said that he came to the scene after the accident and spoke to Mr. Elston and Gary Davies. Later that afternoon he also spoke to the plaintiff, Jim Davies, at the hospital.

[85] Cst. Morgan said that Gary Davies described the conversation with the truck driver as "amicable"; that Jim Davies put his hand on the truck, let go of the truck, lost his balance and fell.

[86] Cst. Morgan said that when he spoke to Jim Davis at the hospital later that day, Jim Davies also described the conversation with the truck driver as amicable. He said that the plaintiff told him there were no aggressive movements by Mr. Elston who did not swerve into the plaintiff with his truck but just continued in a straight line, and there were also no sudden changes in speed, that he had just fallen over because he had lost his balance.

[87] Cst. Morgan said he asked Jim Davies if the truck driver had swerved into him and tried to make him fall and he said he did not.

[88] Cst. Morgan was asked in chief if he asked Jim Davies what caused him to fall, and if Mr. Elston did anything to cause him to fall. Cst. Morgan said that Jim Davies said he just lost his balance, fell and that he was embarrassed because he was such an experienced rider and Mr. Elston had just travelled straight down the road.

[89] Although he was interviewing the plaintiff at the hospital, Cst. Morgan thought the plaintiff seemed fine and in good spirits.

[90] Cst. Morgan said that he gave Mr. Elston a warning to let trivial matters go next time; and also told the Davies not to ride two abreast on a roadway.

[91] In cross-examination, Cst. Morgan agreed that he captioned his written report on the incident as a "road rage incident" because he believed that Mr. Elston got in his truck when he did not have to and confronted the Davies over a trivial matter.

[92] Cst. Morgan admitted that he took no notes at the scene and did not record the statements but made his report later.

[93] Cst. Morgan agreed that there was nothing on the road that contributed to the accident, from his observation, as the road was paved right up to the curb without debris.

[94] Cst. Morgan agreed that at the time he did not think the incident was a *Criminal Code* investigation, and if it had been, he would have taken different steps. He also did not think of it as a motor vehicle incident. He thought of it as an incident where a person fell off his bike. He agreed that his interviews were short, perhaps five or ten minutes.

[95] He agreed that it is a familiar and common occurrence for two cyclists to ride abreast in bike lanes, which generally does not cause a concern because it does not obstruct traffic.

[96] The plaintiff cannot remember any conversation with a police officer afterwards when he was in the hospital or other events in the hospital. At the time he was suffering from very serious injuries. In cross-examination he said he could not in his wildest dreams have said to an officer that the defendant did nothing wrong and if he did say that he would have been out of his mind, which I take to be a reference to his condition in the hospital when he was interviewed. I was left

questioning whether or not the plaintiff could properly hear and understand the police officer at the hospital.

[97] Gary Davies denied telling Cst. Morgan that the conversation with the driver was amicable. He said that his father was trying to defuse the situation, and amicable would be a way to describe how the Davies handled themselves, as they did not have a choice, there was a huge vehicle beside them and they were not going to get into a heated discussion.

[98] In cross-examination, Gary Davies denied the proposition that the officer asked him if the driver did anything intimidating or aggressive or caused the accident and that Gary Davies told him he did not. Gary Davies testified that he told the police officer that the truck encroached into the bike lane. He said that he told the officer that there was an altercation with the driver, and that was the reason his father crashed.

[99] Gary Davies agreed that the officer gave him a warning about riding two abreast. Later he spoke to the officer by telephone, and was informed that there would be no charges against the driver of the truck. He said that he felt frustrated by this and told the officer that maybe they would follow up civilly.

### D. Kevin Elston's Evidence

[100] Mr. Elston testified that he was in his front garden on the day of the accident when he heard a voice out of nowhere saying "you think you can move your fucking mirrors". His parked truck must have been between him and the cyclists, because he said he looked up and saw two cyclists in his view just crossing the top of his truck's hood.

[101] Mr. Elston testified that he felt perfectly entitled to park his vehicle where it was parked. Mr. Elston agreed that his truck is a full size one ton truck, with side mirrors that stick out over one foot on each side.

[102] Mr. Elston said the comment about his mirror did not make him angry but it made him question it and that is why he got into his truck and went after the cyclists. He said he wanted to find out "what the big whup was", because no one else has a problem with the mirrors and there would be lots of room for a single rider to go by them. He wanted to know "why it was a problem".

[103] Mr. Elston agreed that he crossed two intersections and travelled approximately 1.7 km before he caught up to the cyclists.

[104] Mr. Elston said that when he caught up to the cyclists, they were riding side by side with Gary Davies about one foot ahead. Mr. Elston could not see how far inside the bike lane Jim Davies was because he could just see his head. Mr. Elston said that he never realized that Mr. Davies was elderly.

[105] Mr. Elston said he thought his speed when driving beside the cyclists was probably 20 or 25 kph.

[106] Mr. Elston said he came up beside the two cyclists, slowed down his vehicle and called out "who had the problem with my mirrors?" He said that the one cyclist, now known to him as Gary Davies, told him to "fuck off" and said some other things. He said he cannot recall saying anything himself, and the other cyclist, now known to be Jim Davies, eased up to him with his bike and placed his hand on his window. Mr. Elston testified that he then said to the cyclist "do you think you own the road" and received a quick response which he cannot recall. He said he heard Jim Davies saying "it's not worth it" but he did not know if he was referring to Mr. Elston or the other cyclist.

[107] Asked in direct where his truck was relative to the bike lane, he said his truck was in its lane, and not in the bike lane.

[108] Mr. Elston agreed in cross-examination that when he was speaking to the cyclists and driving down the road, he alternated between looking over at them and looking forward to the road.

[109] Mr. Elston conceded it was not safe to be driving while looking at the cyclists.

[110] Mr. Elston took his time to answer the question of whether he was looking forward or looking out the side window when he made the choice to accelerate away. He first suggested he was probably looking forward but then corrected himself to say he did not know. He clearly understood the implications of the question, because if he was not looking sideways he could not be sure the hand was off his door. Mr. Elston said he knew the cyclists were fine after he pulled away because he could see them through his rear window, their heads side by side.

[111] As for when he was looking down the road with the cyclist in arm's length, he admitted he was not thinking about whether it was a safe choice to operate a vehicle in an arm's length of a cyclist when he could not even see him.

[112] Mr. Elston admitted that rather than pull up alongside the cyclists and drive next to them, it would have been safer to signal or ask them to pull over, or to drive further up the block, pull over, and flag them over.

[113] Mr. Elston agreed that chasing after cyclists in a truck can be dangerous. He agreed that these cyclists did not know he was coming. He agreed that they would have no idea who he is and why he was there and the cyclists would be surprised to see his full size pick-up truck next to them.

[114] Mr. Elston agreed that in this situation, if the truck ran into the cyclist, the cyclist could do nothing; that the cyclist was vulnerable; and it would be understood if the cyclist felt intimidated.

[115] Mr. Elston admitted that when Jim Davies was in between the truck and Gary Davies, he was boxed in and this was not a safe place for the plaintiff because there was no room to manoeuvre.

[116] Mr. Elston said he was very aware that the cyclist's hand was on his vehicle because if he stopped the cyclist would have hit his mirror. He said that when Jim Davies took his hand off the truck the second time he figured this was his

"opportunity", as he then appreciated that the situation was "crazy" and he accelerated away. He admitted he did not give a warning that he was going to do so.

[117] Mr. Elston said that as he was driving away, Gary Davies was waving good bye and saying have a nice day. He could see the cyclists through his passenger door as he was driving away, as he was accelerating and pulling away, then his view was blocked by the headrest. He then heard "whoa whoa whoa", so he looked into his mirror and over his shoulder and could see handlebars wiggling back and forth. He said he did not know how far they were and he suggested that he did not know if they were colliding when he saw the handlebars wobbling. He looked forward again to maintain where he was on the roadway, then looked back again and could see Gary Davies straddling his bike and Jim Davies on the ground.

[118] Mr. Elston said he did not make contact with Jim Davies and he believes Gary Davies must have done so, perhaps because he did not have both hands on the handlebars or was not looking where he was going and hit a storm drain and could have swerved and clipped Jim Davies.

### E. Analysis of Evidence on Causation

[119] The defendants frame the issue of causation as one that turns on credibility and ask the Court to prefer the evidence of Mr. Elston over that of the plaintiff and Gary Davies.

[120] In this regard, the defendants place much emphasis on the direct evidence of Cst. Morgan, which created the impression that the Davies indicated to him that they did not blame Mr. Elston for the accident immediately after the accident. There is certainly some common sense to the argument that if the Davies did not blame Mr. Elston for the accident immediately, their subsequent view that Mr. Elston was at fault is a change of position, self-serving and less credible.

[121] However, Cst. Morgan's evidence cannot, in my view, be taken as supporting a conclusion that the Davies did not immediately blame Mr. Elston for the accident.

[122] Cst. Morgan was asked in cross-examination by counsel for the plaintiff, if absent the vehicle coming up to confront the plaintiff, he knew of any reason why the plaintiff would crash. His answer was "no, he wouldn't have [crashed]". While this is an opinion and not admissible for the truth of it, it is relevant to put in context the rest of the officer's evidence regarding what people told him to help determine if any of the witnesses made prior inconsistent statements or whether in fact the officer used his own words to summarize what others told him, and may not have correctly conveyed the sense of what he was told.

[123] It is difficult to reconcile the notion that the plaintiff told the officer that the truck driver had no responsibility for the accident and he just lost his balance and fell, with the officer's impression that absent the truck driver doing what he did, the plaintiff would not have fallen off his bike.

[124] I observed that the officer's choice of language in his direct evidence in summarizing what he learned from speaking to the Davies could easily be misinterpreted. He said that the plaintiff and Gary Davies described the conversation with Mr. Elston as amicable. But in cross-examination he agreed that he thought what they meant was that Jim Davies' portion of the conversation was amicable, that Jim Davies was trying to be calm and to defuse the situation. He agreed that all the witnesses were of the opinion that Mr. Elston had "confronted" the cyclists.

[125] Likewise, the officer agreed in cross-examination that what he meant by an aggressive manoeuvre was the truck leaning into or swerving into the cyclists. He agreed that when he said the Davies' told him that the truck driver was not being aggressive, what he meant was that they confirmed that the truck driver was not trying to knock them over with the truck.

[126] Cst. Morgan agreed also that when he said that Gary Davies told him his father lost his balance after he let go of the truck that Cst. Morgan did not ask him why his father lost his balance. Cst. Morgan agreed he still does not know why Jim Davies lost his balance.

[127] It has to be kept in mind that Gary Davies insisted on the ambulance attendant calling the police to the scene, and he would only have done so because he thought Mr. Elston had done something wrong.

[128] I find that Cst. Morgan did not ask many questions regarding the incident and he used awkward language to summarize what the Davies' told him in a way that did not paint an accurate picture. The sense I got from Cst. Morgan's evidence and approach to the investigation is that he formed the view early on that the question he needed to have answered was whether the defendant intentionally swerved at or drove into the cyclist, and when he found out that these were not the facts, he did not consider that it was worth pursuing because it was not an incident going to result in any charges.

[129] I find nothing about Cst. Morgan's evidence impeaches the evidence of Jim or Gary Davies regarding how the accident occurred.

[130] The defendants also challenge Jim Davies' and his sons' credibility because they say they exaggerated the extent to which his injuries have impacted on his cycling since the accident. I am satisfied that they did not deliberately exaggerate or try to mislead the Court in this way. Rather, as is not unusual when there is some loss of ability, the person affected and his loved ones may have a perception that the quantitative degree of loss is greater than it really is.

[131] I found the evidence of the plaintiff and Gary Davies to be internally consistent. While it can be expected that they are not independent witnesses given their family ties, their evidence was not exactly the same and did not have the ring of collusion. Any differences were not material to the issue of causation.

[132] I found both Jim and Gary Davies to be soft spoken and sensitive in describing each other. It is clear they have a great bond between them and respect each other. Why is this relevant? It is because one of the themes of Mr. Elston in his evidence was to portray Gary Davies as the one to blame, using foul language

initially when he saw the truck mirror and later when Mr. Elston caught up with them. I did not believe Mr. Elston's evidence in this regard.

[133] I found Gary Davies' explanation that he has too much respect for his father to carelessly use foul language around him to be entirely believable. His father was 77 years old at the time and by all appearances, a very disciplined and clean-living man. His son was doing something with him they both love to do. Swearing about the mirror would have been entirely out of place.

[134] Likewise, when Mr. Elston caught up to them and was confronting them while driving a large pick-up truck, it would make no sense for Gary Davies to react by foul and aggressive language. I accept his evidence that he did not want to aggravate the situation because he recognized that he and his father were highly vulnerable.

[135] At the same time, I do not entirely accept Gary Davies' evidence that he was not sarcastic when he gave a final wave good bye to the driver with a wish to enjoy his day. But by that point he likely thought the incident was over and it is not the same as responding with aggressive cursing.

[136] In contrast to the Davies' evidence, I found many inconsistencies in Mr. Elston's evidence.

[137] Mr. Elston was not as forthright as he could have been in describing his reaction to hearing the comment about the truck mirror. To get in his truck, chase, drive so close to and say the things he did to the cyclists was so irrational as to be the conduct of an angry man. Mr. Elston attempted to play this down by suggesting he simply was puzzled as to why a complaint would be made about his mirror. This was not credible.

[138] In cross-examination Mr. Elston admitted that he said:

a) "who had a problem with my mirrors";

b) "do you think you own the road";

c) "you cyclists are all the same"; and

d) something to make the point that cyclists are not allowed to ride side by side and if they had been riding single file they would not have a problem with his mirrors.

[139] Mr. Elston admitted that what he meant by the comment that cyclists are all the same was that he felt that the two cyclists were arrogant and acting with a sense of entitlement, and that if they were riding single file they could have ridden by his truck. Remembering that all of this happened in a matter of seconds, what all of this evidence suggests is that Mr. Elston had a chip on his shoulder about cyclists generally and this, in part, fuelled his overreaction to the comment he overheard about his truck's mirror.

[140] I also did not accept Mr. Elston's suggestion that he simply spoke in a conversational tone to the cyclists. Even without being angry, he would have had to raise his voice simply to have it carry across his big pick-up truck, out the window and to the cyclist.

[141] Jim Davies was able to remember some of what was said, and the only way Jim Davies could have heard him across the width of the truck and with his hearing problems (witnessed in court) was if Mr. Elston was yelling. I accept the Davies' evidence that he was yelling at them.

[142] Mr. Elston's words "who had a problem with my mirrors" was the tough-guy equivalent of "who has a problem with me", and I have no doubt at all that the words he said in the context they were said were stated aggressively and meant to intimidate.

[143] Mr. Elston also was not believable on his evidence to the effect that his truck did not intrude into the bike lane. When he gave this evidence he justified it by saying that his truck is big and if it was in the bike lane there would not have been room for two bikes riding side by side. In other words, he seemed to wish to explain where his truck was relative to the cyclists by way of an argument as opposed to memory.

[144] Mr. Elston agreed that when he testified that his truck could not be in the bike lane and still have room for two cyclists, he was referring to the majority of his vehicle. However, he also denied that his tires were ever in the bike lane.

[145] Mr. Elston tried to suggest that it was Jim Davies who was edging over closer to him, but then agreed that it was only a matter of inches and Mr. Elston was looking at him while he hung on to the window. Mr. Elston agreed that he did not see Jim Davies leave the bike lane and that Mr. Davies was close enough to be able to hold on to the door. He agreed that Jim and Gary Davies were in a better position to see where his tires were in relation to the bike lane.

[146] I conclude that Mr. Elston did not know where his truck tires were in relation to the bike lane. He was distracted by his anger and yelling and looking across at the cyclists. At a minimum his right side view mirror was in the bike lane and I find it likely that his tires were at a minimum close to or on the line dividing the bike lane from the vehicle lane.

[147] Mr. Elston's evidence also was less than straightforward in his attempts to suggest that the accident occurred for reasons that had nothing to do with him.

[148] I do not accept Mr. Elston's evidence that having driven away, he then looked back, saw both cyclists were fine and then saw the handlebars of both bicycles wobbling as though the two bikes had collided. I find that he made no mention of this when interviewed by Cst. Morgan, in a situation where he would have been anxious to state this, if true, so as to avoid blame for the accident.

[149] Mr. Elston was questioned about whether he subsequently reported to ICBC that he saw one cyclist collide with the other and an ICBC record in this regard, otherwise hearsay inadmissible for the truth of it, was put to him. He was not sure, said it was possible, but he admitted that he did not see them collide and did not see a moment of impact.

[150] Mr. Elston used hand gestures in support of his testimony that he saw the handlebars of the bikes wobbling. He said he saw them "doing this", swooping his

hands in large gestures back and forth several times, and it could have meant that they were colliding with each other and said they could have hit each other and bounced and could have hit "three times" and that's what he saw in his mirror. He said he did not know when he saw the bikes wobbling if they were colliding. However, he clearly wished to create the impression in his evidence that is what was happening.

[151] This part of his testimony was so exaggerated and lacking in credibility that it undermined the entirety of his testimony.

[152] Mr. Elston's evidence about seeing the bike handlebars wobble had the tenor of trying to suggest something else happened to cause the accident but at the same time trying to avoid going too far in a direct lie: perhaps the bikes collided, he suggested, because he saw the handlebars wobble. In the same vein he suggested that perhaps Gary Davies hit his father's bike by losing attention or hitting a storm grate. I find these suggestions to be without merit.

[153] It is highly unlikely Mr. Elston would have been able to see the bike handlebars wobble from where he was inside his truck; he was too close to the bicycles and I do not accept that he was such a distance away before the crash that he could see them clearly by looking back or in his mirror. He was pulling away quickly and would more likely have been looking ahead at the road.

[154] It is also highly unlikely that going the speed the cyclists were going the handlebars would have wobbled back and forth in the way Mr. Elston indicated with his hand gestures in court, as though they swooped back and forth several times as opposed to there being an immediate crash if the bikes had collided. It is also notable that Gary Davies did not fall off his bike which is inconsistent with the notion that the two bikes collided.

[155] I reject Mr. Elston's suggestion that maybe the plaintiff and Gary Davies bumped into each other and this is what caused the accident. I accept the Davies' evidence that their bikes did not collide.

[156] It is interesting that the defendants' counsel did not advance submissions that the accident occurred because the plaintiff and Gary Davies collided. But I note that even if the Davies' bikes had collided this could still have been caused by the way Mr. Elston was driving, throwing one or both of the cyclists off balance.

[157] There is also no evidence of a storm grate close by the accident site.

[158] It is not necessary for me to parse out the exact mechanics of what caused Jim Davies to fall—for example, did he lean too far one way to try to increase the distance between him and the truck, or did the power of the truck taking off spin him off balance, or was he so startled and afraid for his safety that he lost balance?

[159] To any person in Jim Davies' shoes, Mr. Elston's conduct would have seemed angry, irrational and threatening. In the situation Jim Davies found himself, due to Mr. Elston's conduct, he was inches away from serious harm. He was being pursued by an angry man whose large moving vehicle was the equivalent of a weapon that could have been turned on him and his son at any second. Any slip by the driver or the cyclist and Jim Davies could have found himself under the rear tires of the truck.

[160] Riding a bike is about balance and riding a bike at a speed of approximately 25 kph requires a high degree of alertness and attention, not just physically but mentally.

[161] Many cases recognize that a car driver can cause a cyclist to crash without actually hitting the cyclist, because the driver's actions cause the cyclist to react and lose balance. For example, in *Bern v. Jung*, 2010 BCSC 730 the driver's negligent choice of driving up the wrong side of a garage ramp caused the approaching cyclist to suddenly brake and lose control and fall.

[162] I am persuaded that what Mr. Elston's conduct did was upset Jim Davies' equilibrium in every sense. I find that Jim Davies was a very experienced cyclist who would not have fallen off his bike riding in a bike lane along a flat and open road he had ridden hundreds of times before, unless his balance was disturbed by

something or someone. I have no difficulty in concluding that what disturbed his balance and led to his fall was Mr. Elston's dangerous conduct in pulling up and driving a large truck next to him within an arm's length, while yelling at him angrily.

[163] I would reach this conclusion regardless of whether or not Mr. Elston pulled away while Jim Davies' hand was still on the truck.

[164] On all areas of factual dispute, I prefer the Davies' evidence over that of Mr. Elston. But on this factual issue in particular, I note that Mr. Elston's conduct was generally reckless and aggressive and so I do not find it hard to believe he would suddenly drive away while Jim Davies' hand was on his truck window frame. Mr. Elston admitted that he accelerated when within an arm's length of the cyclist and when he could not see where the cyclist's bike was in relation to his truck. He gave no verbal warning he was pulling away.

[165] Mr. Elston tried to suggest he was impeded from leaving by Jim Davies putting his hand on the truck, and only when he lifted his hand a second time was he able to find the "opportunity" to drive away. I do not accept this characterization. Mr. Elston had the opportunity to tell Jim Davies he was going to leave, and to allow him to remove his hand from the door, before slowly steering away from being beside the bike lane, but he did not take the opportunity. He also had the opportunity and time to reflect and to avoid confronting the cyclists altogether. He did not take those opportunities and I do not accept that he had a thought process of looking for an "opportunity" to de-escalate the situation.

[166] I find that Jim Davies' evidence was credible. He was forthright about putting his hand on the truck twice and he did not try to embellish his evidence or evade questions. At no time did he overstate the situation by suggesting that the truck was trying to run into him or that it did run into him. I accept his evidence that Mr. Elston accelerated and pulled away when his hand was still on the truck. Given how close they were, and all that had occurred, it is not surprising that this would startle and produce some physical reaction that would cause even the most experienced cyclist to lose balance.

[167] As for whether Mr. Elston's conduct was negligent, I find that the defendant fell below the standard of care of a reasonable and prudent driver, in driving alongside the two cyclists and yelling at them, while so close to the bike lane that it made it intimidating, threatening and unsafe for the cyclists; and then in addition in pulling away quickly, without warning, with Mr. Davies so close by and with his hand on the truck.

[168] It is obvious as a matter of common sense that such driving conduct was without reasonable care for the safety of the cyclists and was negligent.

[169] No matter how aggravating a cyclist's behaviour might be, and I find there was nothing aggravating about the Davies' conduct, a driver of a motor vehicle can never be justified in deliberately using a motor vehicle to confront a cyclist who is riding a bike. Confrontation creates a serious risk of harm to the cyclist which is way out of proportion to anything the cyclist might have done. A driver of a motor vehicle is not entitled to impose a penalty of death or serious bodily harm on a cyclist just because the cyclist was rude or broke a traffic rule.

[170] It has to be remembered that motor vehicles have four wheels, automatic brakes, seatbelts, and the driver is nicely encased in a heavy steel cage and that a person on a bicycle is not in a situation which is the least bit comparable, even if going the same speed as a vehicle. A cyclist cannot stop on a dime, is vulnerable to losing balance, and can be seriously injured or killed if he or she makes contact with a motor vehicle or falls at a high speed.

[171] Mr. Elston and Jim Davies knew this at the time that Mr. Elston was confronting Jim Davies. This is what made the situation so unnerving for Jim Davies and this was entirely foreseeable to Mr. Elston who wished to intimidate him.

[172] I conclude that but for Mr. Elston's aggressive and negligent conduct, Jim Davies would not have fallen from his bike. Mr. Elston's negligence therefore caused the accident and resultant injuries.

### 2. Was the Plaintiff Contributorily Negligent?

[173] I turn to the duties of cyclists.

[174] On the busy streets of the Lower Mainland of BC, it is a fact that cyclists and drivers of motor vehicles have to increasingly share the road. Sharing the road requires respect for everyone on it. Cyclists have a duty to ride their bicycles in a way that is safe and reasonable for the conditions and for other users of the road.

[175] Section 183(1) of the *MVA* provides:

> 183(1) In addition to the duties imposed by this section, a person operating a cycle on a highway has the same rights and duties as a driver of a vehicle.

[176] Here the evidence indicates that Jim Davies was respectfully sharing the road. He stayed in the designated bike lane.

[177] However, the defendants allege that the plaintiff was contributorily negligent by riding side by side with his son and by placing his hand on the defendant's truck. The defendants say that both aspects of the plaintiff's conduct were contrary to the provisions of the *MVA*.

#### A. Riding Abreast in a Bike Lane

[178] The defendants argue that riding side by side is contrary to the *MVA*; the plaintiff argues it is not when the cyclists are in a designated bicycle lane.

[179] The *MVA* sets out more specific rights and duties of operators of cycles at s. 183 of which the relevant provisions for purposes of this case are:

> (1) In addition to the duties imposed by this section, a person operating a cycle on a highway has the same rights and duties as a driver of a vehicle.
>
> (2) A person operating a cycle
>
> > (a) must not ride on a sidewalk unless authorized by a bylaw made under section 124 or unless otherwise directed by a sign,
> >
> > (b) must not, for the purpose of crossing a highway, ride on a crosswalk unless authorized to do so by a bylaw made under section 124 or unless otherwise directed by a sign,

> (c) must, subject to paragraph (a), ride as near as practicable to the right side of the highway,
>
> (d) must not ride abreast of another person operating a cycle on the roadway,
>
> (e) must keep at least one hand on the handlebars,
>
> (f) must not ride other than on or astride a regular seat of the cycle,
>
> (g) must not use the cycle to carry more persons at one time than the number for which it is designed and equipped, and
>
> (h) must not ride a cycle on a highway where signs prohibit their use.
>
> (3) Nothing in subsection (2) (c) requires a person to ride a cycle on any part of a highway that is not paved.
>
> …
>
> (5) A person must not ride a cycle, skate board, roller skates, in-line roller skates, sled, play vehicle or other similar means of conveyance when it is attached by the arm and hand of the rider or otherwise to a vehicle on a highway.
>
> …
>
> (14) A person must not operate a cycle
>
> (a) on a highway without due care and attention or without reasonable consideration for other persons using the highway, or
>
> (b) on a sidewalk without due care and attention or without reasonable consideration for other persons using the sidewalk.
>
> [Emphasis added.]

[180] The law is far from clear that riding two abreast in a designated bike lane is a breach of s. 183(1)(d) which prohibits riding two abreast on a "roadway".

[181] Section 119 of the *MVA* defines a roadway as:

> "roadway" means the portion of the highway that is improved, designed or ordinarily used for vehicular traffic, but does not include the shoulder, and if a highway includes 2 or more separate roadways, the term "roadway" refers to any one roadway separately and not to all of them collectively
>
> [Emphasis added.]

[182] The *MVA* defines "highway" in s. 1:

> "highway" includes
>
> (a) every highway within the meaning of the *Transportation Act*,
>
> (b) every road, street, lane or right of way designed or intended for or used by the general public for the passage of vehicles, and

> (c) every private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited,
>
> but does not include an industrial road;

[183] The parties agreed that Railway Avenue in Richmond is a "highway".

[184] As for what is a bicycle lane, the plaintiff submits and it appears to be uncontested that it is a designated use lane, as defined in s. 119(1) of the *MVA* as follows:

> **"designated use lane"** means a lane of highway in respect of which a traffic control device indicates that the lane is reserved for the exclusive use of persons, organizations, vehicles or cycles or classes of persons, organizations, vehicles or cycles prescribed under section 209.1 or specified in a bylaw or resolution of the council of a municipality under section 124.2;

[185] A roadway is only the portion of the highway "improved, designed or ordinarily used for vehicular traffic": *MVA,* s. 119(1). Therefore, it appears that roadways are a subset of or part of a highway but there can be other parts of the highway that are not roadways if not designed for vehicular traffic.

[186] Under the *MVA* the definitions of a "motor vehicle" and a "vehicle" exclude cycles. This is supported by the Supreme Court of Canada decision in *R. v. Moore,* [1979] 1 S.C.R. 195 at 199 [*Moore*].

[187] Thus, under the *MVA* a cycle is not a vehicle and so cyclist traffic is not vehicular traffic.

[188] In *Ormiston v. Insurance Corporation of British Columbia*, 2014 BCCA 276 [*Ormiston*], both the majority and minority opinions agreed that there are differences between roadways and highways, and that a "shoulder" is part of the highway but since it is not designed for vehicular traffic, not part of a "roadway". As held by Lowry J.A., writing for the majority, at para. 23:

> "Highway" is broadly defined to include any right of way designed to be used by the public for the passage of vehicles (s. 1). That, it is said, includes the shoulder such that sometimes cyclists must ride on it to be as near as practicable to the right side of the highway. Vehicles are required to travel on

> the right-hand half of the roadway (s. 150(1)). "Roadway" is defined as the improved portion of a highway designed for use by vehicular traffic but does not include any shoulder (s. 119). Vehicles cannot travel on the shoulder.

[189] Likewise it would seem that a "designated use lane" that is designed for use by cyclists only, and not vehicles, is not a "roadway". It would seem that such a lane is considered part of the "highway" because s. 119 speaks of a "designated use lane" being a "lane of highway".

[190] It is uncontested that at the time of the accident, the two cyclists were riding in a designated use lane, designated for use by cyclists only. The cycling lane had a solid white line. It was not for use by vehicles. As such, I conclude that it was not a "roadway".

[191] The prohibition under s. 183(2)(d) is from riding bicycles abreast on a "roadway", which is the part of the road ordinarily used for vehicular traffic.

[192] This would suggest, therefore, that in enacting s. 183(2)(d) the legislature must have had a purpose in prohibiting cyclists from riding abreast on the "roadway" but the same purpose did not apply to a designated use lane which is for use by cycles only and is not used by vehicular traffic.

[193] This analysis would lead to the conclusion that the intention of s. 183(2)(d) was not to prohibit cyclists from riding abreast in a designated bike lane that is closed to vehicular traffic as such is not a "roadway".

[194] The problem is reconciling this conclusion with s. 183(2)(c) which requires cyclists to ride as near as practicable to the right side of the highway. The definition of "designated use lane" suggests that such a lane is still part of the highway. If cyclists are required to ride as near as practicable to the right on the highway and the designated used bike lane is considered part of the highway, does this mean they would have to be ride single file to the right side of the bike lane?

[195] I cannot accept such a broad interpretation of s. 183(2)(c) as it would mean there would have been no need for the legislature to set out s. 183(2)(d) and to confine the latter subsection to roadways.

[196] In my view the only way to reconcile ss. 183(2)(c) and (d) is to conclude that the legislature intended to only prohibit cyclists from riding abreast on parts of the highway that are used by vehicles, namely, in roadways. The purposes, logically, must have been to prevent cyclists from impeding vehicular traffic and from creating a danger in their interaction with vehicles by taking up too much space on a roadway. The same purposes do not apply to cyclists travelling in a designated use lane which is restricted to cycles. Two cyclists riding abreast in a designated bike lane do not impede vehicular traffic or create any danger in respect of interactions with motor vehicles since motor vehicles are not permitted in bike lanes.

[197] This conclusion is based on the premise that cyclists riding abreast in a bike lane will still be subject to the requirement to exercise due care and attention and reasonable consideration for others, which will mean that at times when the conditions demand it they will be required to ride single file.

[198] But even if I am wrong and s. 183(2)(c) of the *MVA* does prohibit cyclists riding abreast in a designated bike lane closed to vehicular traffic, this would not establish that Jim Davies was contributorily negligent by breaching that provision.

[199] The common law duty of care in motor vehicle cases is informed by the *MVA*, as confirmed by the BC Court of Appeal in *Salaam v. Abramovic,* 2010 BCCA 212 at paras. 18, 21:

> [18] While the statutory provisions provide guidelines for assessing fault in motor vehicle accident cases, they do not, alone, provide a complete legal framework.
>
> …
>
> [21] In the end, a court must determine whether, and to what extent, each of the players in an accident met their common law duties of care to other users of the road. In making that determination, a court will be informed by the rules of the road, but those rules do not eliminate the need to consider the reasonableness of the actions of the parties. This is both because the rules of the road cannot comprehensively cover all possible scenarios, and

> because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way. While s. 175 of the *Motor Vehicle Act* and other rules of the road are important in determining whether the standard of care was met, they are not the exclusive measures of that standard.



[200] In *Nish v. McLaughlin,* 2014 BCSC 1366 [*Nish*] at paras. 15-19, Gropper J. found that even though the plaintiff had breached the *MVA* by riding his bicycle in a crosswalk he did not demonstrate a lapse of care and found that the defendant was 100% at fault, citing *Deol v. Veach,* 2011 BCSC 1437 at para. 23.

[201] While generally a breach of the *MVA* will be a breach of the standard of care, the real question on the facts of this case is whether there was anything about the plaintiff and his son cycling side by side which contributed to or caused the accident: see *Ormiston* at para. 14.

[202] The defendants are critical of the plaintiff riding next to his son in the bicycle lane but have not really explained how this contributed to the accident. Perhaps the argument is that this left the plaintiff with no room to steer his bicycle to the right to create more space between him and the truck once Mr. Elston drove up beside him. This is an interesting hypothetical but it is premised on Mr. Elston behaving reasonably and not crowding the cyclists if they were riding single file. I have no reason to accept this premise as likely.

[203] Here Mr. Elston knew that the two cyclists were riding abreast when he pulled up beside them. If Jim Davies was sandwiched between Mr. Elston's truck and Gary Davies, that hazard was solely created by Mr. Elston because he pulled up and drove too close to them knowing they were riding abreast.

[204] To put it another way, it was not the fact of the cyclists riding side by side that caused Mr. Elston to crowd Jim Davies, there was lots of room on the roadway for Mr. Elston to be able to give him more space. Rather, it was the fact of Mr. Elston being angry and wishing to intimidate the cyclists that caused him to crowd Jim Davies.

[205] Given Mr. Elston's anger and irrational driving behaviour, there is no reason to believe that if the Davies were riding single file, Mr. Elston would not have come into the bike lane and crowded them regardless, and if they were to the right of the bicycle lane next to the curb they would have nowhere to go.

[206] I accept Jim Davies' evidence that at times Mr. Elston's truck tire was on the line of the bicycle lane. This would put the truck's side view mirror and perhaps even some of the body of the truck into the bike lane. Mr. Elston could not see his tires and could not see Jim Davies' bicycle in relation to his tires and the rest of his truck. He was seemingly unconcerned about crowding the cyclist. This in my view makes it likely he would have had no hesitation to cross the bike lane line to get closer to yell at the cyclists if they had been further to the right of the lane.

[207] Prior to Mr. Elston pulling up and driving beside him, Jim Davies was very comfortable and safe riding his bike in a six foot wide bike lane, next to his son Gary Davies. They were riding parallel, but the bike lane was on a straight flat street which was a designated bike route and where it was common for cyclists to ride side by side according to the evidence of a local officer, Cst. Morgan. There was no obstruction or approaching danger that required them to ride single file. It was a sunny day. They were both experienced riders generally and experienced in riding together so they knew that they had the stability to ride side by side without creating a hazard that one of them might hit the other and cause a fall.

[208] As he was riding along, Jim Davies had no reason to expect a motor vehicle driver to pull up beside them in the way Mr. Elston did. There was lots of room on the road for a driver to give them space and the cyclists were not unreasonable in not foreseeing that by riding side by side a person driving a large truck might deliberately pull up so close to or on the edge of the bike lane so as to crowd them.

[209] As for whether Jim Davies should have taken some kind of evasive action once the truck pulled up beside him, such as braking and moving further to the right, I do not consider that this kind of second-guessing in a dangerous situation can rise to the level of a finding of contributory negligence. Jim Davies was an experienced

cyclist, he was travelling a good speed, he was at first thinking the person was approaching for directions, and once he learned the driver was angry he could not know if the driver would chase him further into the bike lane if he braked and tried to move towards the right. Braking could also put him in harm's way because it could cause him to fall and be run over by the back wheels of the moving truck. He instead made the split second judgment to try to defuse the situation by asking the driver to let it go. I find no negligence in this approach.

[210] I conclude that even if it was contrary to the *MVA* to ride abreast in a bike lane, the two cyclists were highly visible to Mr. Elston who approached them knowing they were riding abreast, and there was nothing about the two cyclists riding abreast that contributed to or caused the accident.

### B. Plaintiff's Hand on the Truck

[211] I will accept that by placing his hand on the open truck window frame, Jim Davies was in breach of s. 183(5) of the *MVA* as this appears conceded by the plaintiff. That still leaves the question whether doing so amounts to contributory negligence.

[212] Jim Davies found himself in extraordinary circumstances. Mr. Elston had created a dangerous situation, and was coming too close to Jim Davies with his large truck. In this sudden dangerous situation, Jim Davies made the judgment call to protect himself by putting his hand up on the truck window frame. I find that was not an unreasonable or imprudent thing for an experienced and skilled cyclist to do in the circumstances: he would be able to use his arm as a guide and for stability so he could steer his bike parallel to the movements of the truck, to try to keep a safe distance between his bike and the truck in case the truck veered even more in his direction.

[213] Further, although this point was not specifically raised in evidence it seems logical to me that since the cyclists were lower on the road than Mr. Elston and he was so close to them, the fact that Jim Davies put his hand on the truck window would have served as a useful warning to Mr. Elston as to Jim Davies' location.

[214] I come back to the point that Jim Davies was highly vulnerable and his physical safety was at high risk. Who is to know what would have happened if Jim Davies had not put his arm up? Would Mr. Elston's truck have come too close to him, knocked him down and run him over? That possibility was very real at the time. It is not a hypothetical anyone would want to test. Jim Davies exercised the best judgment he could in the dangerous circumstances created by Mr. Elston.

[215] I also note that the entire incident happened very quickly. The parties did not make submissions as to the reliability of the witnesses' time estimates, but I find it unlikely any of them could accurately estimate the time other than to agree that it all happened in a matter of seconds.

[216] The law has long recognized that if an emergency situation on the road is created by a driver's negligence, another road user's response to the emergency will be viewed less strictly. The kinds of tough decisions made by road-users facing an emergency are sometimes referred to as decisions made in the "agony of the collision".

[217] The "agony of collision" doctrine was summarized in *Gerbrandt v. Deleeuw* [1995] B.C.J. No. 1022 at paras. 10-11 where Hunter J. stated as follows:

> [10] An often quoted summary of the law concerning the agony of collision is found in an old text, Huddy on Automobiles, 7th Ed., page 471 and page 335 (this passage is relied upon by the Saskatchewan Court of Appeal in *English v. North Star Oil Limited* [1941] 3 W.W.R. 622 (Sask. C.A.) and *Reineke v. Weisgerber* [1974] 3 W.W.R. 97 (Sask. Q.B.)):
>
> > "Under circumstances of imminent danger an attempt to avoid a collision by turning one's course instead of stopping the vehicle is not necessarily negligence. Or an attempt to stop when a turn would have been a more effective method of avoiding the collision is not necessarily negligence . . . one who suddenly finds himself in a place of danger and is required to consider the best means that may be adopted to evade the impending danger is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence."
>
> [11] In *Gill v. C.P.R.* [1973] 4 W.W.R. 593 Mr. Justice Spence speaking for the court said the following:

> " It is trite law that, faced with a sudden emergency the creation of which the driver is not responsible, he cannot be held to a standard of conduct which one sitting in the calmness of a Courtroom later might determine was the best course …"
>
> [Emphasis added.]



[218] Further, Mr. Elston by his own admission was aware that Jim Davies put his hand on his truck, not once but twice. He therefore was under an obligation to exercise reasonable care in the circumstances. I have found that he did not do so.

[219] I find that Jim Davies did not cause or contribute to the accident in the circumstances where he made a judgment call to put his hand on the truck to try to protect himself.

[220] I conclude that Jim Davies was not contributorily negligent.

### 3. Was Gary Davies Partly Negligent?

[221] The defendants argue that Gary Davies was contributorily negligent by riding two abreast with his father. Leaving aside the issue that the defendants did not advance any pleading against Gary Davies who is not a party to this proceeding, I have rejected the notion that riding side by side contributed to the cause of Jim Davies falling off his bike.

[222] It is also to be remembered that once the truck pulled up next to the two riders, Gary Davies did try to take reasonable action, by trying to pull ahead with his bike to give his father more room.

[223] The defendant also submits that Gary Davies was contributory negligent for instigating the incident by using foul language and by exacerbating the altercation by using foul language. I have already rejected the submission that Gary Davies used foul language or inflamed the situation. I add parenthetically that we do not live in a time when use of a swear word is the equivalent of throwing down the gauntlet.

[224] I find that Gary Davies did not do anything negligent to cause or contribute to the accident.

### 4. Liability for The Plaintiff's Subsequent Fall

[225] The plaintiff returned to cycling after recovering sufficiently from his injuries.

[226] On July 29, 2013, he fell off his bike. The circumstances were that he was on a bicycle ride to Whytecliff Park. After stopping, he was on an incline and put his left foot in his pedal clip first, then tried to get going. Due to the first accident, his right leg is much weaker and usually the plaintiff compensated for this by putting his right leg in his pedal clip first, pushing off with the stronger left leg. On this day he did not follow that routine. My understanding is that as he started off he did not see a speed bump and running into it made him lose balance and fall.

[227] The plaintiff feels that if the first accident had not happened, he would have had the strength and balance not to have fallen this second time.

[228] However, no matter how much cycling matters to him, it is still a recreational activity and his own choice to continue to cycle. Knowing that his right leg was significantly weaker, if the plaintiff was going to make the choice to continue cycling and to use pedal clips, he had his own responsibility to take extra care of himself due to his now weaker right leg. I find that Mr. Elston is not liable for Mr. Davies' second fall from his bike and resultant injuries.

[229] In the second bike fall, the plaintiff fractured his left hip, several ribs and dislocated his left shoulder. He did not require surgery for these injuries and eventually recovered from them. The second fall did not exacerbate his injuries from the accident but it is possible that for approximately three months when he was recovering from those injuries that he was less able to participate in a strength training program to assist him in recovering from his right-sided injuries sustained in the accident caused by Mr. Elston.

[230] In assessing damages, I will not award the plaintiff any damages for his injuries from the second accident. For example, I will keep in mind that if he needed home care help or other care, or had pain and suffering or loss of enjoyment of life

during that period of time due to the injuries from the second accident, he is not entitled to damages in this regard.

[231] It is important to note, however, that the defendants do not argue that the plaintiff failed to mitigate his damages caused by them in respect of the first accident.



### 5. What Damages ought to be Awarded for the Plaintiff's Injuries?

[232] Having found Mr. Elston solely responsible for causing the accident, I turn to consider what injuries were caused by the accident. By and large the injuries are not disputed. The defendants called no medical evidence.

#### A. Nature of Injuries

[233] The crash landed Jim Davies' against the roadside curb. His right hip and pelvis area fractured badly.

[234] He required surgery for his fractured pelvis and hip twice: first on October 17, 2011, and when that repair failed; he required a total replacement of his right hip, which occurred on February 13, 2012.

[235] As an additional trauma caused by the accident, Jim Davies suffered a right lower extremity thrombosis, or blood clot, from the fracture and required treatment for this in December 2011.

[236] The surgeries left him with some nerve damage along his right thigh and foot, leaving him with some permanent numbness and tingling.

[237] He was left with a permanent leg length discrepancy of 2 cm.

[238] The plaintiff also has been left with permanent anterior groin pain on his right side.

[239] The injuries have left the plaintiff significantly weaker in his right side leg, hip and foot and less nimble than he is on his left side. His walking has been negatively

affected, as he now walks with a significantly uneven gait and he occasionally trips and falls. His falling appears related to the fact that his right leg and left leg are different lengths, and his right side foot, leg and hip do not respond with the same agility or strength as his left side, which is particularly problematic for him on uneven surfaces and in climbing stairs.

[240] It is expected he will continue to suffer from these injuries.

[241] The plaintiff has worked hard to try to recover as much function as he can, despite his injuries, including by starting to cycle again and walking. He had a cycle shoe adjusted for his right foot so that it has a lift in it where it attaches to the pedal clip. He also has adjusted his walking shoes.

[242] In assessing damages, the overarching legal principle is that the plaintiff is entitled to damages to restore him to the position he would have been in, absent the accident, so far as this can be done with money. He is not entitled to be placed in a position that is better than his original position would have been: *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 32.

### B. Special Damages

[243] The parties agree that the plaintiff is entitled to special damages of $5,162.69 in relation to out-of-pocket expenses he incurred for treatments and medical expenses and for mileage in getting to treatments.

### C. Loss of Past Income and Future Earning Capacity

[244] The plaintiff claims that the injuries he suffered in the accident have caused him to suffer a loss of income in the period from the accident to trial and a loss of future earning capacity.

[245] The legal principles were summarized by Warren J. in *Abbott v. Gerges*, 2014 BCSC 1329 at paras. 163-165:

> [163] Both past and future income loss is properly considered on the basis of loss of earning capacity: *Ibbitson v. Cooper*, 2012 BCCA 249, at para. 19.

> [164] The burden of proof for actual past events is a balance of probabilities. However, the assessment of loss for both past and future earning capacity also involve the consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities; rather, hypothetical events are given weight according to their relative likelihood. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey*, at para. 27; *Morlan v. Barrett*, 2012 BCCA 66, at para. 38.
>
> [165] An award for loss of earning capacity, whether past or future, requires an assessment that considers the overall fairness and reasonableness of the award, taking into account all positive and negative contingencies. It is not a calculation according to a mathematical formula: *Schenker v. Scott*, 2014 BCCA 203, at paras. 50, 53.



[246] Here the issue very much turns on the question of whether there was ever a real and substantial possibility the plaintiff would have earned more income than he did, but for the accident, or whether this is mere speculation: *Perren v. Lalari*, 2010 BCCA 140 at para. 30.

[247] The plaintiff is a co-owner of a bicycle store with his son Neil Davies. In 1999, when the plaintiff was 65 years old, he retired from working full-time in the store, but he still worked three days a week for a few years. In 2004, the plaintiff retired from the business altogether with no plans to seek out other employment.

[248] The plaintiff was age 77 at the time of the accident, and age 80 at the time of trial.

[249] Prior to the accident the plaintiff still came into the store from time to time to help with chores which were physical in nature, such as: mowing the uneven lawn; carrying bicycles and other equipment up and down stairs; carrying downstairs large quantities of bicycle boxes; and taking the cardboard away for recycling. He had no problem performing these chores.

[250] Due to the injuries caused by the accident the plaintiff is no longer able to do these chores at the bike shop. He cannot climb stairs without using a railing for assistance. He does not have the strength or stability when walking to mow the lawn or carry heavy objects. He fatigues easily.

[251] However, in my view this change in his life post-accident is not reflected in a loss of earning capacity although it may be reflected in a loss of enjoyment of life. He did the chores for pleasure, to feel useful and to help out his son. He was not paid for doing these chores.

[252] Neil Davies described the chores performed by the plaintiff at the bicycle store before the accident as "favours". While it was clear in his evidence that he felt the shop benefitted from the odd jobs that his father performed, he did not give any evidence as to the cost of replacing those services or evidence as to how having the services proved by a non-salaried co-owner impacted on the bottom line of the business.

[253] The plaintiff received bonuses as an owner of the business. The bonuses were at the discretion of his son Neil Davies and in large part based on the financial performance of the business. The plaintiff continues to receive bonuses.

[254] Neil Davies suggested that he has recently started to apportion a smaller bonus to his father, due to the fact his father is unable to contribute to the store to the same extent he used to do. However, this evidence was difficult to accept or quantify due to the absence of other comparative evidence. For example, the plaintiff did not call evidence as to the financial performance of the business and the amount of bonuses received by other employees or the co-owner of the business, Neil Davies. Without knowing a more complete picture I am unable to conclude that any decrease in bonuses paid to the plaintiff post-accident was due to a decrease in the services that he provided the business as opposed to a decrease in the financial performance of the business or the need to increase the amount paid to other employees for unconnected reasons.

[255] I find that the money that Jim Davies received from the store pre-accident was based on his status as co-owner as opposed to his contributions as an employee or someone doing occasional favours for the store. The plaintiff's status as co-owner has not changed as a result of the accident.

[256] The evidence falls short of proving a real and substantial possibility that but for the accident, the plaintiff would have earned an income that is now foreclosed to him due to his injuries. I find that the plaintiff has not proven an entitlement to damages for past or future loss of earning capacity.



### D. Cost of Future Care

[257] A plaintiff who is injured due to the negligence of another is entitled to be compensated for the future costs of caring for the plaintiff which are reasonably and medically necessary due to the lasting effect of the injuries. There needs to be an evidentiary link between the medical evidence and the recommended future care item and consideration of whether or not the plaintiff is likely to use the recommended future care item: see *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 82-84 (S.C.); and *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 40, 52-54.

[258] The plaintiff called evidence from Ms. Haley Tencha, an occupational therapist, who assessed Jim Davies in his home and prepared a report, dated May 9, 2014, recommending future purchases and treatments to meet his medical needs.

[259] The assessment of damages for cost of future care has to take into account the plaintiff's life expectancy. According to the expert opinion evidence of Dr. Tom Elliott, a specialist in internal medicine and endocrinology and with experience in estimating life expectancy, the plaintiff has a likely life expectancy post-trial of 10.3 years based on his status as never having been a smoker, or, if his superlative health is considered, a life expectancy of 11.7 years. I find that the longer life expectancy is more likely given the plaintiff's long history of following a healthy and active lifestyle and his drive.

[260] The plaintiff called expert opinion evidence from Mr. Robert Carson, an economist, to assist with providing multipliers to calculate the present value of future cost of care items. I accept Mr. Carson's evidence as to the method of calculating the present value of costs that might be incurred by the plaintiff in the future.

[261] The plaintiff concedes that two items recommended by Ms. Tencha are not supportable as necessary due to his injuries, namely, the purchase of a replacement bath mat and certain medication that he was already taking before the accident.

[262] The defendants concede that some of the recommended items are supportable on the evidence, without necessarily agreeing with the quantity or frequency of replacement.

[263] The following are my findings on the items recommended for future care:

a) The plaintiff is unsteady on his feet getting in and out of the shower and bathtub due to his injuries. A single wall mount grab bar at a cost of $135 is necessary to provide for stability and to keep him safe from falling. Based on a life expectancy of 11.7 years, the present value is $132.

b) The plaintiff needs supportive orthopaedic shoes, both athletic and casual shoes given his uneven gait due to his injuries. Ms. Tencha recommended that these be purchased on an annual basis, and factored in the cost difference between orthopaedic shoes and regular shoes, the latter of which the plaintiff would have purchased in any event regardless of the accident. The purchase cost differential for orthopaedic athletic and casual shoes is $67 and $56 respectively. The defendants challenge the recommended annual replacement rate of the shoes. I accept the defendants' point that the evidence does not support the need to replace these shoes every year. I find it more reasonable to assume that the plaintiff will buy two sets of these shoes in his lifetime, one set soon after trial when he receives judgment, and one set five years from now. The plaintiff is entitled to the present value of those costs based on the life expectancy of 11.7 years and Mr. Carson's evidence on multipliers.

c) The plaintiff needs lifts in his shoes because of the discrepancy in his leg length as a result of his injuries. Ms. Tencha estimated the cost

would be in the range of $250 to $400 per year for two sets of shoe lifts. The defendants concede this cost is reasonable. The present value of this cost, assuming a mid-range annual cost of $320, is $3,229.

d) The plaintiff has sought out massage therapy since the accident to help him deal with the stiffness in his hip and leg and manage the pain. The defendants concede that some future massage therapy is warranted in relation to the accident, but correctly point out that even prior to the accident the plaintiff from time to time pursued this type of therapy, and may have sought it out more and more as he ages, and so not all future massage therapy can be attributed to the accident. Before trial he was incurring a cost of $58 per massage therapy session, with eight sessions in 2013 and ten sessions so far in 2014. I estimate that due to his injuries the plaintiff will need and seek out massage therapy six times per year in addition to whatever massage therapy he may have pursued but for the accident. He is entitled to the present value of this amount, applying the multipliers set out in Mr. Carson's evidence, based on a cost of $58 per session and a life expectancy of 11.7 years.

e) Ms. Tencha made recommendations that the plaintiff participate in a six month active rehabilitation program, using a kinesiologist. This was recommended by Dr. Russell O'Connor, a physiatrist who assessed the plaintiff on December 13, 2013. I note that such a program is not likely to greatly increase his functionality but it may help him to a small degree such that it is worth doing. I find that that this program is necessary as a result of the plaintiff's injuries, and the reason he has not pursued it until now is that he has been focussed on getting back to cycling. The plaintiff is likely to pursue such a program if he is awarded damages to pay for the cost of it. He is awarded damages for the estimated present value cost of this program, which is $1,500.

f) Ms. Tencha recommended that the plaintiff purchase an annual community gym pass to facilitate his active rehabilitation program with a kinesiologist, at an annual cost of $293. In addition, there will be the drop-in cost for the kinesiologist to attend the gym with him for 28 sessions, at a cost of $168. While the plaintiff has some exercise equipment at home, it is old and not likely to be as varied and helpful as what a kinesiologist might recommend he use. I accept that these costs are reasonably necessary and that the plaintiff will incur them after trial, but only once. I find little real possibility that the plaintiff will keep going to a gym on an annual basis as this has not been his pattern in the past. His history is that he much prefers being active outside. What I expect will happen is that he will learn exercises in a gym with a trained kinesiologist and then when the program is over, will be given suitable exercises to practice at home on his own. The plaintiff is awarded damages of the present value of the cost of a single annual gym pass and 28 sessions with a kinesiologist.

g) Ms. Tencha recommended that the plaintiff obtain psychological counselling. The evidence of friends and family was that the plaintiff has been sad and irritable since the accident. On its face this recommendation makes sense as from my limited observations the plaintiff does seem to be grieving the loss of his former self and having a difficult time finding pleasure in all that he still can do. However there is no medical evidence in support of this expense and the plaintiff has not shown any inclination to pursue this on his own. I conclude this is not supported on the evidence as an item of future care cost. I pause to note that general feelings of unhappiness are addressed somewhat in non-pecuniary damages, which if the plaintiff wishes can be spent on such things as psychological counselling to help him realize more enjoyment from life.

h) Ms. Tencha also recommended that the plaintiff engage the services of an occupational therapist to provide guidance to him in increasing his

> activity levels at home and in the community. I find no evidentiary support for this as a cost that is medically necessary or as something the plaintiff would possibly incur in the future.

[264] If the parties are unable to agree on the present values or totals of the above, they have liberty to make further submissions to me, in writing, within 45 days of this judgment.

[265] As part of the plaintiff's claim for cost of future care, the plaintiff also submits, and Ms. Tencha recommended, that he will need assistance with yard maintenance tasks and home maintenance tasks.

[266] More specifically, Ms. Tencha noted that the plaintiff used to mow the lawn, and now can no longer do it according to his self-reports. He also can no longer trim the trees.

[267] Further, Ms. Tencha noted that the plaintiff used to clean the windows and gutters of his home, but is no longer comfortable doing so and will need assistance for these tasks in the future.

[268] This was consistent with the plaintiff's evidence at trial. I find that due to his uneven gait, caused by the injuries he sustained in the accident, he is unable to do much of the outside home and yard maintenance work he used to do, as he has less stability on his legs making it difficult to walk or push or carry equipment across a lawn and unsafe for him to be on ladders.

[269] The defendants correctly point out that this type of claim for the loss of the ability to perform home maintenance is better characterized as loss of homemaking capacity: *Westbroek v Brizuela*, 2014 BCCA 48 at paras. 72-79 [*Westbroek*]. Such damages are not dependent on whether replacement costs are actually incurred.

[270] In *Westbroek,* the Court of Appeal emphasizes that such an award should be approached conservatively, expressing concern that in that case there was limited

evidence as to the allocation of household tasks between husband and wife pre-accident.

[271] Here the evidence was quite clear that pre-accident, the plaintiff used to perform the outside home maintenance, not his wife, and that he has lost the capacity to do so due to the injuries he sustained in the accident.

[272] I also note that the plaintiff was in exceptional health prior to the accident and, despite his advanced years, was well able to and did perform these tasks.

[273] Ms. Tencha estimated the replacement cost on the basis of four hours of lawn mowing assistance per month for six to seven months per year, plus an additional four hours of assistance per year for tree trimming, at a total annual cost of between $735 and $1,008. She also estimated the replacement cost for window cleaning and gutter cleaning to be $84 to $106 and $210 to $315 annually, respectively. I conclude that the plaintiff is entitled to the lower range amounts for a present value of an annual amount of $1,029 ($735+$84+$210) to compensate him for the loss of his ability to trim the trees, and clean the windows and gutters of his home, based on his life expectancy. This amount is to then be reduced by 25% to take into account the contingency that as he aged he would have become less willing and capable of performing these tasks in any event, regardless of the accident.

[274] The plaintiff addressed any claim for damages in relation to tasks performed inside the home pre-accident as compared to post-accident, based on a claim made in trust for his wife, which I will address next.

### E. In-Trust Claim

[275] Two medical experts, Dr. Russell O'Connor, a physiatrist, and Dr. Darius Viskontas, an orthopaedic surgeon, provided opinions at trial that the plaintiff was totally disabled from the date of the accident, October 14, 2011, until approximately April 2012, approximately six months.

[276] In the meantime, the plaintiff's spouse had to look after all of the plaintiff's needs and perform all of the household chores. Had she not done so, the plaintiff would have been required to hire outside help. This care went beyond the ordinary support one expects from a spouse and founds a claim for damages in-trust: *Bystedt v. Hay*, 2001 BCSC 1735 at para. 180; aff'd 2004 BCCA 124.

[277] In April 2012, the plaintiff began to slowly increase his ability to move around, and even started to cycle. Although he was nowhere back to his former strength, he was desperate to do what he could to exercise and hopefully speed up his recovery.

[278] For some considerable time after that, the plaintiff's attempts to exercise often took the only energy he had, leaving him with little ability to contribute to household chores. However as his devotion of all of this energy to exercise was a matter of personal choice, supported by his wife, and there was no evidence that the quantity of exercise he performed was strictly necessary for medical reasons, I do not consider that his resultant decreased contribution to interior household chores after April 2012 should result in an award of damages.

[279] The plaintiff submits that his wife performed 100% of his share of interior household duties from the date of the accident until mid-June 2012, some eight months. The plaintiff claims the value of this should be determined based on statistics that the average male spends approximately 3.1 hours per day on the household chores, and that the replacement cost of hiring an unskilled person to do these chores is $16.75 per hour, totalling $12,635 approximately.

[280] I find the evidence of average statistics not helpful here. My sense of the evidence was that prior to the accident Mr. Davies spent far less than 3.1 hours per day on chores inside the house. The labour in the marriage was divided more along the lines of inside/outside, with Mrs. Davies doing the majority of the chores inside the house and the plaintiff doing the majority outside the house. He has already been compensated above for his loss of capacity to perform those chores he used to do outside the house.

[281] But I do accept that Mrs. Davies was also required to help the plaintiff with all of his basic personal needs in the first six months. He could not walk at first and then only with a walker and crutches, and was highly dependent on her help.

[282] Keeping in mind the figures relied upon by the plaintiff, which I find overestimate the losses, I estimate the value of the in-trust claim for necessary services provided by Mrs. Davies due to Mr. Davies' injuries to be $10,000, and accordingly award these as damages

### F. Non-pecuniary Damages

[283] All of the above categories of damages are meant to restore the plaintiff to a financial position that he would have been in, but for the accident.

[284] The law recognizes that money cannot restore a person to a state where he did not suffer pain or lose enjoyment of life due to his injuries. These types of damages are referred to as "non-pecuniary" precisely because they are not based on financial losses.

[285] In an attempt to ensure consistency and give guidance to trial courts, and apparently influenced by concerns about runaway awards in the United States, the Supreme Court of Canada held in 1978 that the rough upper limit for non-pecuniary damages should be $100,000: *Andrews v. Grand & toy Alberta Ltd.,* [1978] 2 S.C.R. 229 at 260-265 [*Andrews*].

[286] Since the *Andrews* case the $100,000 figure has been adjusted by trial courts to take into account inflation. It is recognized that that rough upper limit of non-pecuniary damages is for the most catastrophic of injuries.

[287] In order to decide what award of non-pecuniary damages is fair, the courts must consider non-pecuniary damages in a way that is relative to what other people in other accidents might suffer, keeping in mind the rough upper limit of damages for the very worst cases. For example, a young child who is brain damaged, or rendered a quadriplegic, and who has a long life of suffering ahead of her, will be

awarded far greater non-pecuniary damages than an older person who already had a full career, still has all bodily functions and has no brain injury. It is important to understand this thinking is not about valuing a young person as worth more than an elderly person, it is about recognizing the relative differences between the impact of injuries on the lives of two people given the severity of the injuries and where they are in their lives.

[288] Here there is no doubt that Jim Davies was devastated by his injuries. He defined himself by his robust health and athleticism. He went from a fit and active senior to feeling like a weak old man. His stamina has been greatly diminished, and he is in pain. While due to his age he does not have as long a life ahead of him as would a younger plaintiff, due to his age it is also very difficult for him to find new interests or to re-define himself.

[289] Fortunately the plaintiff is an incredibly stoic man. He has pushed himself, despite his pain and injuries, so that he is back to cycling in the range of 9,000 km per year. This cycling is of a lesser quality and far less enjoyable than before, to be sure. He is tired and in pain, and he remains very impaired in his ability to walk on any uneven surface or for any great distance.

[290] The plaintiff also can no longer enjoy doing the chores he used to do at his bike shop.

[291] In summary, due to the accident, the plaintiff's precious twilight years are going to be less enjoyable than they otherwise would have been but for the accident.

[292] The defendants submit, based on a review of case law, that if liability was established an appropriate non-pecuniary damages award would be in the range of $75,000 to $85,000; the plaintiff says that an appropriate award is $175,000.

[293] Based on the seriousness of Mr. Davies' injuries, the numerous medical treatments he has undergone, the pain he has suffered and will continue to suffer, and the diminishment in enjoyment of the activities he used to love to do, but keeping in mind the relative nature of non-pecuniary damages and the rough upper

limit for the most catastrophic of injuries, I find that $85,000 is an appropriate award of non-pecuniary damages on the facts of this case.

## III. Conclusion

[294] In a moment of temper, Mr. Elston decided to get in his truck and confront Jim Davies who was cycling in a bike lane just an arm's length away, while both were travelling down the road at approximately 25 kph. Mr. Elston's conduct caused Jim Davies to crash his bike and suffer significant injuries.

[295] For any other 77 year old that might have been the end of active athletic activities. Luckily Jim Davies is a determined man who worked very hard to recover from his injuries. Today he is back on his bike.

[296] Because of his age, Jim Davies does not have the same losses as a younger person could have suffered: at the time of the crash he was already retired, and because he is already in his senior years, he had already lived a very fulfilling long life. Nevertheless, he has been robbed of the strength and vigour he otherwise would have enjoyed. He took steps his whole life to be an active healthy senior, and these admirable efforts have been thwarted to a significant extent by the accident.

[297] The plaintiff is awarded damages of $100,162.69 plus damages for cost of future care as set out in these reasons.

[298] Ordinarily the plaintiff would be entitled to costs. If the parties cannot agree on costs they have liberty to seek a further costs hearing before me, on giving notice to the court of their intention to do so within 45 days of this judgment.

"The Honourable Madam Justice Susan A. Griffin"